The Central Law Journal.

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CURRENT TOPICS.

THE publication of so-called evidence taken before a committee of investigation of the Missouri Legislature, which it is now announced has closed its labors, serves as a text from which to consider the evils which this kind of investigation promotes. These investigating committees, both legislative and congressional, appear, during the last few years, to have degenerated into mere engines for the promotion of political defamation or personal spite. That investigations may become necessary from time to time, there can hardly be any doubt. It is not against investigation *qua* investigation that we protest, but we do most heartily object to that system which permits *ex parte* testimony, taken before a body frequently partisan in character, and always more or less engaged in fishing for evidence, to be published to the world during the progress of the investigation. Under this outrageous system, the reputation of no man is safe. His most innocent acts may, by a malicious or ignorant witness, be made to appear in a disgraceful light, and so published to the world, and himself held up to obloquy, before he has ever had notice that his acts were under consideration, or before an opportunity has been given him to explain that which may be easily susceptible of explanation. Much as has been said and written against the system of taking testimony before grand juries, there is at least this to be said in its favor, that no publication is permitted thereof, and no word of information allowed to go abroad, until the accused is actually in court and prepared to make his defense. With these smelling committees the case is entirely different; and it is a notorious fact that they are frequently raised for the express, though not expressed, purpose of bringing out statements in the public prints which shall redound to the assassination of private character and the gratification of personal or political malice. How the evil is to be cured is another question. Congress and the various legislatures within their respective spheres claim to be omnipotent in these matters; and though some few of these committees have, we believe, had sense of decency sufficient to withstand popular clamor for open investigation, and thus averted some of the evils, it is not in human nature to expect that a general reform in this matter will take place, until it is made the subject of positive statutory or constitutional provision. Perhaps the shortest way of reaching the matter would be by a constitutional amendment, expressly prohibiting the publication of this class of testimony, until the committee shall have completed their investigations and made their reports, and then only permitting it, when the parties accused or suspected shall have been arraigned for the alleged offenses. A milder, but less direct remedy suggests itself in an amendment to the libel laws, holding both newspapers publishing, and persons giving oral circulation to the information obtained by such committees, strictly accountable in damages to the parties thereby injured. The subject, however, is too wide to be thoroughly discussed in a brief article. We simply call attention to the evil with the hope, that some effectual means for its correction may be devised.

THE author of several elementary works on the law, Mr. Josiah W. Smith, has lately laid down with considerable force some rather novel ideas which he considers to be the true principles of judicial decision. Mr. Smith was presiding in an English county court the other day, where the question was raised, whether the terms of a certain statute had been complied with. Having ruled that they had, the defendants' counsel asked leave to appeal. Mr. Smith thereupon informed the parties and their counsel, that he did not feel himself bound or even justified, in a case in which he was clear, to give any dissatisfied party the opportunity of appealing, and thereby exposing the opposite party to the expense and vexation resulting therefrom; that he was confirmed in that view more and more every year, when he saw the manner in which the decisions of the High Court of Justice were week by week overruled by the Court of Appeals, and when he saw the Court of Appeals itself overruled by a higher tribunal. He therefore refused to allow an appeal, and at the same time took occasion to express his views on the subject of judicial decisions at some length. "Equally eminent judges," he said, "have been and are governed by different systems or theories of judicial decision, leading to opposite results; the one mainly proceeding on technical refinements; the other on principles of natural justice, common sense, and public policy; the one deciding on general rules or principles, the other looking to the exceptive circumstances of each case as much as to general rules or principles. The adoption of the former system by some judges has led to endless uncertainty, frequent litigation, both original and appellate, incalculable expense and vexation, and the grossest injustice and contravention of public policy. And it has been the prolific source of a mass of refined trash and learned rubbish which strains the brains, occupies the public time, and exhausts the bodily and mental powers of the judges, to no purpose but to defeat moral right and sound expediency." To remedy this, what was needed was an enactment like one which he

had prepared, and which was to the following effect: "Subject to any plain enactment or plain agreement to the contrary, and subject to the established rules of law, where an exception to such rules is not called for by the circumstances, all cases in litigation other than cases of construction shall, in the discretion and to the best of the judgment of the judge or judges deciding the same, be decided, so far as may be, according to justice, moral right, and public policy, and all cases of doubtful construction shall, in the discretion and to the best of the judgment of the judge or judges deciding such last-mentioned cases, be decided according to the presumable intention of the parties or testators. But the operation of this enactment shall be subject to any previous decisions of the superior courts, clearly and absolutely governing the cases in litigation, in the opinion of the judge or judges deciding such cases." This, he said, was his view on the subject. There was so much uncertainty in the law, arising from the different modes of decision adopted by different judges, that he did not think himself justified, much less bound, to expose the party in whose favor he decided to the vexation and expense and uncertainty of a trial of the case in the courts of law. When he saw a different mode of interpretation adopted, he should be ready to alter his practice.

WE HAVE heretofore taken occasion to animadvert on the facilities that a loose system of bar discipline affords to shysters—particularly those affecting the secret divorce business—to bring disgrace on the whole profession; and we have called attention to the cards of these miserable libels on the name of attorney, as published in the daily journals. From these cards it would appear that most of their nefarious trade is carried on in Chicago; but a circular which has just fallen into our hands shows how and where the final processes are brought about. This circular is issued by a fellow signing himself George A. Webster, Attorney at Law, Salt Lake City, Utah, and is addressed to the members of the legal profession in the states. The exordium "respectfully" draws "attention to the divorce law of Utah, which is certainly the most liberal now in force in the United States." Attention is then called to an act of Congress of June 22d, 1874, entitled "An Act in relation to Courts and Judicial Officers in the Territory of Utah," the 3d section of which provides that "Probate Courts in their respective counties shall have jurisdiction in suits of divorce for statutory causes," etc. Then follows a brief synopsis of the divorce statute of the Territory, by sec. 2 of which it appears, that "if the court is satisfied that the person applying is a resident of the territory, *or wishes to become one*, then the court may decree a divorce for any of the following causes, to wit: Impotence, desertion, habitual drunkenness, inhuman treatment, conviction of felony; or, *when it shall be made to appear, to the satisfaction and conviction of the court, that the parties can not live in peace and union together, and their welfare requires separation.*" A quotation from section 5 of the same act makes it appear that the actual residence of the parties, or either of them, within the jurisdiction of the court is unnecessary; a mere wish to become a resident is sufficient. Further on it is shown by quotation of Congressional acts and decisions of the Supreme Court of the United States, that such divorces, so obtained, which are valid in Utah, are also valid everywhere. Under sec. 5 of the divorce law of Utah, he says, "a proper and timely warning is given defendant, either by publication in a newspaper, here or elsewhere, as ordered by the court, *frequently at suggestion of counsel.*" His document then concludes as follows: "You have doubtless noticed the number of soliciting advertisements for divorce practice, by parties in Chicago and other places. These solicitors all procure their divorces in this Territory, and I have represented and acted for many of them myself. But learning that most of the cases came from the profession through these brokers, I concluded to inform the profession as to the facts, and solicit direct, thus securing less division of fees and greater satisfaction."

THUS MUCH Mr. George A. Webster. We presume he has quoted the statute of Utah correctly, and if he has, it only remains to say on that head, that such a law is as great a disgrace to the Territory, as he is to the courts in which he professes to practice. The mainspring of the evil, however, appears to be found in the act of Congress, which gives the Mormon Probate Court of Utah jurisdiction in such cases, with no other limit than may be imposed by a Mormon legislature. If this be not offering a direct premium to successful rascality, we fail to see what it is; and it calls for speedy attention, either in the way of amendment or repeal, so that the terrible evils now rampant may, in some measure, be checked. In the meantime the only remedy to hand at once is, for the courts to take prompt action in preventing these traders in family sorrows from practising before them. It is to this end, and with the faint hope that our suggestion may be acted upon, that we give Mr. George A. Webster, attorney at law, the benefit of the foregoing gratuitous advertisement.

IN THIS connection there is some comfort to be gleaned from the fact, that another shyster, one Gale, has just been disbarred by the New York courts for nefarious practices, in procuring what appears to have been a collusive divorce, in the courts of that state. The fact of the divorce being collusive within the knowledge of Gale was not, however, the cause of his being disbarred, though it ought to constitute sufficient cause at any time. He was shown by the evidence adduced to have induced the woman to go to a hotel with him, where he registered her and himself under a false name as man and wife, and where he detained her against her will all night, making use of this fact to show, when the cause came up, that she had been guilty of adultery. When the divorce was obtained, she was absent in New Jersey, and supposed that it

had been granted on the ground of desertion. Upon discovery of the true state of the case, she applied to have the decree set aside, which was done on production of evidence that, though thus entrapped into a suspicious situation, she had remained in a room, separate from Gale, during the night of her detention at the hotel; and it was on this evidence that the proceedings, which had such a satisfactory termination were instituted against him. Gale, however, has still a large field for his industry in the courts of Utah, and will doubtless turn up soon as a worthy co-laborer in infamy with George A. Webster.

THE publishers of Judge Dillon's work on Municipal Corporations sent to the Chief Justice of England an author's copy of the book. This called forth from the head of the Common Law Bench of Great Britain the following letter, which will be read with interest, not only for what this eminent and distinguished judge says of the work, but for the just sentiments he expresses upon the legal and general relations of the two countries:

LONDON, December 30, 1876.

SIR:—I have read your work on Municipal Corporations with very great interest, and admiration of the learning, historical and legal, which it exhibits. It affords a most valuable exposition of the law of both countries on the important subject of which it treats.

I pray you to believe that the respect paid by the Jurists of the United States to the authorities of this country, in regard to the law which both nations have derived from a common source, is most cordially reciprocated. There is scarcely a discussion of any importance in which American decisions, and American authors are not cited, and the judgments and *dicta* of a *Marshall* or a *Story* are familiar to us, as those of a *Mansfield* or an *Ellenborough*. May this ever be so! While, as an Englishman, I desire that a community of origin and a community of interests (when the latter are properly understood) should draw the two nations closer and closer, as a lawyer I could wish that a common jurisprudence should assist to cement the bonds of international amity.

We have had recently in our Court of Criminal Appeal a very interesting discussion, on a great question of international law, in the case of the "*Franconia.*" I take the liberty of sending you herewith a copy of my judgment in the case. The review of the authorities—many of them American—may give it an interest in your eyes.

With the assurance of my great and sincere respect, I remain your most obedient servant,

COCKBURN.

Hon. John F. DILLON,
Etc,, etc., etc.

NOTICE OF PROTEST—BY WHOM GIVEN.

As a general rule, the notice of dishonor of commercial paper is given, in the first instance, by the holder in whose hands payment or acceptance is refused. It has even been laid down as a rule that notice from another could never be sufficient, but that it must in every instance proceed from the holder himself. Buller, J., in Tindal v. Brown, 1 T. R. 167-70. And Lord Eldon, in *ex parte* Barclay, 7 Ves. 596-7, decides the question in the same way, for the reason that notice from any one else than the one who intends to avail himself of it, in order to charge the party notified of the simple fact that the bill or note had been presented and payment refused, would not be notice that a third party intended to rely upon him for payment. It is true that there are three facts which the notice is supposed to communicate to the drawer or indorser: 1. That the paper was duly presented. 2. That acceptance on payment was refused. 3. That the holder looks to the party to whom notice is given for payment. But when the party has been regularly notified of the dishonor, it would seem to follow that he was looked to for payment. Such, at least, is the obligation he assumes when he draws or indorses the paper, and though it is customary, and perhaps prudent, to state in the notice that the recipient thereof is looked to for payment, such information would seem to be supererogatory, and its omission could hardly vitiate the notice. Lord Denman, in the case of Chapman v. Keane, 3 Adolph & Elliss, 193-6-7, flatly declares that the rule requiring notice to come from the holder, laid down in Tindal v. Brown, is not good law. The circumstances of the case of Chapman v. Keane were essentially different from those of the case overruled. The plaintiff had indorsed the bill to another, who had left it in the hands of plaintiff's clerk, with instructions to collect, or, in case of default in the payment, to give notice of its dishonor. The bill was duly presented, payment refused, and the clerk gave the notice to the defendant in the name of the plaintiff, instead of the real holder of the bill. Plaintiff subsequently took up the bill, and in the action brought thereon it was held that the notice was sufficient, notwithstanding it was not from the holder at the time such notice was given. This case was decided upon the authority of Jameson v. Swinton, 2 Camp. 373, and Wilson v. Swabey, 1 Stark. 34, where it is laid down that notice of any antecedent party to the bill would operate to the benefit of a holder or subsequent indorser. See also Riddle v. Mandeville, 5 Cranch, 322; Rogerson v. Hare, 1 W. W. & D. 65; Crocker v. Getchel, 23 Me. 392; Stafford v. Yates, 18 Johns. 327; Glasgow v. Patte, 8 Mo. 339; Glasscock v. Bk. of Mo., *Ib.* 443; Batchelor v. Priest, 12 Pick. 406. Mr. Chitty, in his valuable work on Bills of Exchange (Chitty on Bills, ch. 10, p. 527, 8th ed.) declares the rule to be that it suffices if the notice be given after the bill is dishonored, by any person who is a party to the bill, and who would be entitled to re-imbursement after paying the same, and that such notice will inure to the benefit of all antecedent parties, and render any further notice from them unnecessary; the object of the notice being to enable the parties to have recourse to the maker, acceptor or drawer, it makes no difference from whom the notice is received. And in Thompson on Bills, § 4, pp. 496-7, the law is regarded as settled, that notice from any party to the bill will be sufficient, if it conforms, in other respects, to the requirements of the law, and, when given by the last indorser to

the first, or to the drawer, will inure to the benefit of all intermediate parties. In Bailey on Bills, 557, however, the doctrine is limited to cases where the party giving the notice is himself liable to pay the bill or note. Judge Story, in citing Mr. Bailey with approval (Story on Prom. Notes, § 303), objects to the breadth of statement employed in most of the cases, as intimating that notice by parties would be sufficient, regardless of the fact that they might not themselves be liable to pay the same, or entitled to re-imbursement. Says the learned author: "Suppose, for example, a second indorser should give notice to a first or third indorser, having received none himself, and therefore not being bound to pay the note, and the holder has not given any notice whatsoever to any of the indorsers, the question in such a case would arise, whether the notice was available in favor of the holder. Suppose the last indorser has received no notice from the holder, and is therefore discharged, would notice by him to the prior indorsers be available for the holder?" The main difficulty in answering this question, is to get an accurate conception of the state of case supposed. When he says that the second indorser who gives notice to one of the others has "received none himself, and therefore not being bound to pay the note," it is difficult to understand whether it is meant that the prior indorser is discharged by the lapse of time without notice, or whether he has not yet received notice from subsequent parties, but has given it at once, without awaiting the notice which may still come to hand in time to fix his liability. In the case of the last indorser who is discharged for the want of notice, there could be no difficulty in answering the question in the negative without disturbing the doctrine laid down by the cases cited above, or in the note to the section above quoted, where the statements are regarded as too broad. If the last indorser has been discharged, he has, to all intents and purposes, ceased to be a party to the note. When he is discharged, it is not only because no notice has been given him by the holder, but because the time has expired within which the holder could give notice effectually; and it would be difficult to imagine how the antecedent indorsers could be held, when their subsequent indorsers were discharged by the expiration of the time without notice, unless there were circumstances to excuse notice to such antecedent parties. Where, however, the party giving the notice is one who is still liable to receive notice by which he will be bound, there could be no doubt that, under the authorities, a notice from him would not only bind antecedent parties, but that such notice would inure to the benefit of any other party to the bill who sought to avail himself of it, in an action against such antecedent party. But when any party has been discharged by the *laches* of another, the right of action against him is gone, and he becomes a stranger to the bill. 2 Daniel, 42.

The reasons given why notice from a stranger to the bill should not operate effectually, are hardly satisfactory, in view of some of the later cases. Lord Ellenborough, in Stewart v. Kennett, (2 Camp. 177,) says that "the notice must come from some person who can give the drawer or indorser his immediate remedy on the bill; otherwise it is merely a historical fact." The earlier authorities, both English and American, are generally in accord with this view, though some of them maintain the doctrine that the notice may come from the acceptor, which was held to be the law by Lord Ellenborough himself in the case of Rosher v. Kiernan, (4 Camp. 87,) although it was said in Hopes v. Alden, (6 East. 16,) that such notice from the drawer would not be sufficient. In Stanton v. Blossom, (14 Mass. 116,) notice from the drawer, who had refused acceptance, was held not to charge prior parties with notice of such non-acceptance, as it did not come from the proper party. This case is in conflict with Rosher v. Kiernan, *supra*, as there could be no material difference between a notice of non-acceptance from the drawee and a notice of non-payment from the acceptor. However, Mr. Daniel, in his late treatise on Negotiable Instruments, p. 44, regards the law as settled, that the acceptor may give notice of non-payment.

There can be no doubt that a notice from the agent of the holder or indorser will be sufficient. This has been repeatedly declared as the doctrine governing cases where notes or bills were left with a bank, and the cashier gave the notice, as well as in other instances of agency. And such a notice may be given by the agent to the principal, where the note has been deposited in the customary way, with the same effect, and subject to the same formalities, as if the bank were a holder for value. Coperthwaite v. Sheffield, 1 Sanf., (N.Y.) 416; Hazlett v. Poultney, 1 Nott & M. (S. C.) 466; Turner v. Lague, 2 Johns. 179; Bank of Cape Fear v. Seawell, 2 Hawks, (N. C.) 569; Mead v. Enge, 5 Cow. 303; Payne v. Patrick, 21 Tex. 680; Green v. Farley, 2 Ala. 322; Bk. of State v. Vaughan, 36 Mo. 90.

In such case, however, no special formalities are required in order to constitute the bank the agent of the holder. A mere delivery of the note is sufficient to establish the relation, with all its attendant responsibilities and immunities. In the case of Mt. Pleasant Bank v. McLeran, (26 Ia. 306,) it was held that notice from the drawee was sufficient, when he was acting as the agent of the holder. And in one of the earlier English cases (Lysaght v. Bryant, 2 Carrington & Kirwan, 1016), it was decided that, where the party giving the notice was a stranger to the bill, but represented that he was the holder, and gave the notice in that capacity, and the real holder subsequently adopted and ratified his acts, the notice was as valid as though it had come from the real holder or his antecedently appointed agent. If the rules laid down in these two cases may be considered as a fair presentation of the law governing similar cases, there is nothing to hinder a holder or indorser from availing himself of the notice given by an acceptor, drawee, or even an entire stranger

to the bill. The agent's authority may arise from subsequent notification, as well as from prior appointment, and when notice is given by the drawee, the acceptor or the stranger, the holder or indorser has but to adopt the act as his own to give it all the force and effect of a notice from himself. As the law seems to have been gradually approaching a recognition of the right of any party to a bill to avail himself of notice by any one, such will probably be the recognized rule, sooner or later. In Glasgow v. Pratte, 8 Mo, 336, it is held that the maker of a note may give the notice, and this case is cited with evident approval by the court in First Nat. Bk. v. Ryerson, (23 Ia. 508.) In Konig v. Bayard, (1 Pet. 250,) an opinion by Chief Justice Marshall recognizes the validity of a notice from an acceptor, *supra protest*.

It does not seem at all essential that the party giving the notice of dishonor should have any antecedent knowledge or information upon the subject, provided the fact of dishonor be subsequently established. In the case of Jennings v. Roberts, (29 Eng. L. & E. 118,) the defendant had indorsed a bill to plaintiff, which was accepted and payable in London. Plaintiff indorsed it to a country bank. On the day it fell due the plaintiff saw the manager of the bank (his indorsee), by whom he was informed that the bill would be back from London in the morning, This information was communicated the same day to defendant by plaintiff, with a request for the money to meet it. It subsequently appeared that the manager, at the time he gave the above information, did not know that the bill was dishonored; but such proved to be the case, and it was returned, as he anticipated, on the following day. It was held that this want of knowledge did not vitiate the notice, so long as the fact communicated proved to be true.

In Harrison v. Ruscoe, 15 M. & W. 231, it was decided that misrepresentation as to the name of the person giving the notice would not entirely vitiate the same. The circumstances of the case may be stated thus: The attorney of C gave notice of dishonor in due time to A, but stated therein, by mistake, that he was directed to do so by B, from whom he had no authority to demand payment of the bill, or give notice of dishonor. Although it was held that this mistake would not totally avoid the bill, it effected a change in the status of the party giving the notice, to the extent that he was regarded as occupying the same position towards the party notified as would have been occupied by B, from whom the notice purported to come, had he authorized it, and any defense which A would have had against B would be available against C. So also in the case of Rogerson v. Hare, (W. W. & D. 63,) plaintiff, the holder of the bill, told his attorney to give notice to defendant in the name of plaintiff's indorser. He did so, and the court held that, as the person from whom he had authority was a party to the bill, and the person in whose name the notice was given was also a party, the case came within the principle laid down in Chapman v. Keane, *supra*, and that the notice was valid and binding.

In case of the death of the holder or party from whom the notice should emanate, it should be given by his executor or administrator, within a reasonable time after his appointment. Story on Prom. Notes, § 304. And in case of the death of one of several joint owners, the notice should be by the survivor. Evans v. Evans, 9 Paige, 178; Story on Prom. Notes, § 304. In case of the bankruptcy of the holder, the notice should be given by the assignee. If it falls due after the selection or appointment of the assignee, he is governed by the same rules as to time as other parties holding in their own right; but if it becomes due prior to the appointment, then the assignee should give notice within a reasonable time after such appointment. As the bankrupt holder stands in privity with the assignee, has an interest in the note or bill, and represents the interests of his estate, until the selection or appointment of his assignee, a notice from him before the assignment would be valid. At all events would this be so, if the assignee subsequently ratified the acts of the bankrupt. Story on Prom. Notes, § 305. If the holder be an infant or person under guardianship, notice from either the guardian or the ward would be equally good. And if the holder be a *feme sole*, and she marries before the maturity of the note, notice of dishonor should be given by her husband, or by her with his consent, but would probably be available without direct proof of such consent, even where the common-law disabilities of married women prevail. See Chitty on Bills, 23, 24, 26; Burrough v. Moss, 10 B. & C. 558; McNeilage v. Holloway, 1 B. & Ald. 218. And where the note is given to a married woman, probably the rule would be the same as to notice. Philliskirk v. Pluckwell, 2 M. & S. 393.

Where the bill of exchange was made payable at a time certain, and presentment for acceptance was thereby rendered unnecessary, it was held, in Union National Bank v. Marr's, Administrator, (6 Bush, 614,) that, if the bill was presented for acceptance before the day of maturity, and acceptance refused, it would be necessary for the holder to give notice of such refusal to all the parties to the bill upon whom he wished to rely for payment.

W.

THE office of the black rod, the incumbent of which came into prominent notice at the recent opening of the British parliament, is so old that its origin is all but lost in obscurity. The holder was originally a servant about the court, his emblem denoting that he was to keep order, and see that people behaved with decorum in the House of Lords. From time to time his status improved and the emoluments increased. His duties are now mostly confined to summoning the House of Commons, in the name of the sovereign, to attend at the bar of the House of Lords to hear the opening or valedictory speech from the throne. The House of Commons makes it a point to shut its doors in the face of the messenger, to show that they are quite independent of the Lords. The black rod has to knock thrice at the door of the Commons, when the sergeant-at-arms interviews him through a small aperture in the door, and keeps him waiting until the speaker is informed of the messenger's presence, and says: "Admit him." Black rod then advances gravely along the floor, bowing to the speaker every three or four paces. After delivering his message he retires backward, as he came, and makes it a great point in that most awkward process to go over the same line as on entering.

PRACTICE IN FEDERAL COURTS.

BEARDSLEY v. LITTELL *ET AL.*

United States Circuit Court, Southern District of New York, January, 1877.

Before HON. SAMUEL BLATCHFORD, District Judge.

1. PRACTICE IN FEDERAL COURTS—HOW FAR GOVERNED BY STATE PROCEDURE.—Section 914 of the Revised Statutes of the United States, which provides that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held," etc, does not embrace rules connected with the subject of the evidence of witnesses, which are regulated by specific provisions of law found in the same title of the same statute.

2. EXAMINATION OF WITNESS BEFORE TRIAL.—The provision of the New York Code of Procedure providing for the examination of witnesses before trial is not adopted by the Federal courts in that state, as the mode of proof in such courts is regulated by sec. 861 of the Revised Statutes.

3. WHETHER THE EXPRESSION "practice, pleadings, and forms and modes of proceeding," as used in sec. 914 of the Revised Statutes, applies to the evidence of witnesses, either as to its character or competency or the mode of taking it, *quaere*.

BLATCHFORD, J.:

This is an action at law to recover damages for the infringement of letters patent. It is at issue, and ready for trial. The plaintiff now presents to the court his affidavit setting forth that the testimony of the defendant Littell is material and necessary for the plaintiff, upon the questions of the kind and description of the machines used by the defendants, and claimed to be an infringement of the plaintiff's patent, "the amount which he has used the same," and the profits resulting from such use; that these matters are peculiarly within the knowledge of said defendant, and can not well be proved except by his testimony; and that it is necessary to take his examination before the trial, in order that the plaintiff may properly prepare for the trial. On this affidavit an application is made for an order that the defendant appear for examination as a witness before the trial.

Section 389 of chapter 6 of the Code of Procedure of the State of New York provides as follows: "No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party he had, on behalf of the adverse party, except in the manner provided by this chapter." Section 390 provides as follows: "A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled in the same manner, and subject to the same rules of examination, as any other witness, to testify, either at the trial, or conditionally, or upon commission." Section 391 provides as follows: "The examination, instead of being had at the trial, as provided in the last section, may be had at any time before the trial, at the option of the party claiming it, before a judge of the court, or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance." It is provided by section 914 of the Revised Statutes of the United States, that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." The application now made is founded on the view that the practice of examining an adverse party before the trial, as a witness in a suit at law, has become the practice of this court by virtue of the above section 914. This is not a correct view.

Section 861 of the Revised Statutes provides that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided." There is nothing in the Constitution or Statutes of the United States which sanctions any other mode of trial in a common-law action, than a trial by jury in the presence of the court, unless such a trial is waived. Therefore, where the statute speaks of the examination of witnesses in open court in the trial of an action at common law, it means the examination of witnesses in the presence of the court and the jury, at the trial, and not before the trial. But, as some witnesses might be out of the jurisdiction of the court, or would probably be absent from such jurisdiction at the time of the trial, provision was to be made for such cases. Hence the words in section 861, "except as hereinafter provided." In pursuance of this view, section 863 makes provision for taking by deposition, *de bene esse*, before the trial, by certain specified officers, out of court, the testimony of witnesses who, though within the United States, are beyond the reach of a *subpœna*, or who are bound on a voyage to sea, or who are about to go before the trial out of the United States, or who are about to go before the trial to some place within the United States which is beyond the reach of a *subpœna*, or who are ancient and infirm. Section 866 makes provision for taking depositions under a *dedimus potestatem* "according to common usage"—that is, by commission, and for taking depositions *in perpetuam rei memoriam*. Sections 882 and following sections provide for documentary evidence. These are all the statutory provisions enacted by the United States on the subject; and it is quite clear that they cover the whole subject of oral testimony in actions at common law in the courts of the United States. There is nothing in section 914 which supersedes them; and under them, the examination of an adverse party as a witness before trial, in a common-law suit, can not be had.

It may well be doubted whether there is anything in section 914 which applied to the subject of the evidence of witnesses, either as to its character or competency, or the mode of taking it. The expression, "practice, pleadings, and forms and modes of proceeding," is well satisfied without including in it the subject of evidence. At all events, it can not be regarded as covering matters connected with the subject of the evidence of witnesses, which are regulated by specific provisions of law found in the same title of the same statute. In the case of the Indianapolis and St. Louis R. R. Co. v. Horst (9 Ch. L. N. 114), the Supreme Court of the United States, in commenting on section 914, say that the language of that section, that the conformity mentioned in it is to be "as near as may be," means, "not as near as may be possible, or as near as may be practicable;" that the indefiniteness of the expression devolves upon the federal court the duty of construing and applying the provision in each case, and gives to the court the power to reject any subordinate provision in a state statute, which, in its judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in the federal court; and that, while section 914 is, to a large extent, manda-

tory, it is also, to some extent, only directory and advisory. In the spirit of that language, it may be observed, that section 389 of the Code of Procedure of New York abolishes an action to obtain discovery under oath, in aid of the prosecution or defense of another action, and then section 391 allows an examination of an adverse party as a witness before the trial, evidently as a substitute for a discovery before trial in an ancillary action. But, a suit in equity to obtain discovery under oath, in aid of the prosecution or defense of a suit at law, is not abolished in the courts of the United States. The distinction between suits in equity and actions at common law exists in the courts of the United States. Such distinction is recognized by the Constitution, and can not be abolished by Congress. It is also recognized in section 914. Therefore, one of the reasons for the practice, in the courts of the State of New York, of examining an adverse party as a witness before trial in a suit at law, does not exist in respect to the federal courts.

It is also worthy of consideration, that section 391 of the Code of Procedure of New York provides, that the party to be examined shall be examined before a judge of the court, or a county judge, and shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance. The examination, if allowed in the federal court, must take place before a judge of the court. There is no alternative officer to take the place of the county judge. If the party can not be compelled to go out of the county where he resides, the benefit of the provision would practically be confined to suits pending in the counties where the federal judges should happen to reside or to be present, unless the party to be examined could incidentally be found in such county. There would be no uniformity in such a provision, and such a practice could hardly be said, as a general practice, to conform, "as near as may be," to the state practice.

Moreover, in view of the limited judicial force in the courts of this district, in comparison with the amount of business pending in those courts, and of the fact that the examination, if had, must take place before a judge of the court, it is quite clear that an allowance of the practice would "unwisely encumber the administration of the law," especially in view of the fact that a party may, at the trial, be called as a witness by the adverse party, in a suit at law, and may, if a case exists, under section 863, be examined as a witness, before trial, on behalf of the adverse party, by deposition *de bene esse*.

The application is refused; and I am authorized to say that the Circuit Judge concurs in the foregoing views.

SALE OF INTOXICATING LIQUORS—EXEMPLARY DAMAGES.

SCHAFER v. SMITH.

Supreme Court of Indiana, February Term, 1877.

HON. JAMES L. WORDEN, Chief Justice.
" HORACE P. BIDDLE,
" GEORGE V. HOWK,
" SAMUEL E. PERKINS,
" WILLIAM E. NIBLACK, } Associate Justices.

1. CONSTITUTIONAL LAW.—The 12th section of the Indiana liquor law of 1873, which provides that a wife may have a right of action against the person causing the intoxication of her husband "for all damages and for exemplary damages," is not in conflict with the constitution of the state.

2. LEGISLATIVE POWER—FINE AND EXEMPLARY DAMAGES DISTINGUISHED.—The general rule that, where an act is the subject of both a criminal prosecution and a civil action for damages, exemplary damages will not be allowed in such action, is a proper subject of legislative action. There is a distinction between a fine and exemplary damages; a fine is an amercement for a past violation of law, but exemplary damages are intended to prevent a future repetition of the offense.

3. GENERAL AND SPECIAL VERDICT—EXCESSIVE DAMAGES.—Where the general verdict gave the plaintiff $500 damages, and a special finding of the jury showed that $200 of that sum was allowed as exemplary damages, the court above can not hold that the damages so assessed were excessive.

HOWK, J., delivered the opinion of the court:

This was an action by appellee as plaintiff against the appellant, as defendant, in the court below. In her complaint the appellee alleged in substance that, for twenty years prior to the commencement of her suit, appellee had been and then was the wife of one Albert Smith, upon whose good conduct, frugality and personal labor she had been and was dependent for her support; that said Albert Smith, when not intoxicated, nor under the effects of intoxication, was an industrious laboring man and a skillful artisan, and regularly earned and received for his labor five dollars per day, applicable to the support of themselves and family, and which was so applied by him accordingly; that said Albert Smith was in the habit of becoming intoxicated, and appellant, well knowing the same, on divers days and nights between the 3d day of March, 1873, and the commencement of said action, at Petersburgh, in Pike County, Indiana, unlawfully, willfully, maliciously, and after notice to him not to do so, sold to said Albert Smith intoxicating liquors, thereby causing him frequently to get intoxicated, in consequence of which he as often became and was infirm and diseased, and for times varying from one to ten days, and aggregating within said period not less than six months, or two-thirds of the whole time, was incapable of labor, and by reason thereof appellee, as his wife, was compelled to and did labor for their support; and that said Albert Smith, while so intoxicated, and while so infirm and diseased from the effects of intoxication, was cruel, morose and unkind in his treatment of appellee, and entirely helpless and dependent, and, in addition to the exertion required for the support of herself and children, imposed upon her the additional burden of providing him with necessary food, and wearied her with the labor, attention and care she was compelled, by his said conduct, to bestow upon him; whereby appellee averred that she had been and was injured in her person, property and means of support, to her damage $5,000, for which judgment was demanded.

To this complaint appellant demurred for the want of sufficient facts to constitute a cause of action, which demurrer was overruled, and to this decision appellant excepted. And appellant then answered the complaint in denial of its allegations. And the action, being at issue, was tried by a jury in the court below, and a general verdict was returned for the appellee, assessing her damages at $500. And under the instructions of the court below, the jury also returned, with their general verdict, their special finding upon a particular question of fact stated in writing, as follows: "State what amount you allow to plaintiff, if anything, for exemplary damages?" "Two hundred dollars."

Appellant then, upon certain written causes, moved the court below for a new trial, which motion was overruled, and to this decision appellant excepted, and judgment was rendered for appellee upon the general verdict.

Appellant has assigned in this court two alleged errors, as follows: 1. Overruling his demurrer to

appellee's complaint; and, 2. Overruling his motion for a new trial.

It is apparent, from her complaint, that appellee sued the appellant in this action to enforce a right of action which the appellee had under the provisions of the 12th section of the act then in force, to regulate the sale of intoxicating liquors, etc., approved February 27th, 1873. Acts of 1873, 151. It was provided in and by the 12th section of said act, among other things, that every wife who shall be injured in person, property or means of support, by an intoxicated husband, or in consequence of the intoxication, habitual or otherwise, of such husband, shall have a right of action in her name, "against any person or persons who shall, by selling, bartering or giving away intoxicating liquor, have caused the intoxication, in whole or in part," of her husband, "for all damages, and for exemplary damages." Acts of 1873, 155.

Appellee's complaint seems to have been carefully prepared to conform to the requirements of the said 12th section of said act, and the demurrer thereto was correctly overruled.

The second alleged error in the record of this action was the overruling, by the court below, of appellant's motion for a new trial. In his motion appellant assigned five distinct causes for such new trial, as follows: 1. The verdict of the jury was contrary to law; 2. The verdict of the jury was contrary to the evidence; 3. The assessment of damages was excessive; 4. Error of the court below in giving to the jury instructions numbered 1, 2, 3, 4, 5, and 6; and, 5. Error of the court below in refusing to give to the jury the instructions asked for by appellant.

As we understand the brief of appellant's learned counsel in this cause, all the questions presented by the alleged erroneous decision of the court below, in overruling appellant's motion for a new trial, except such as relate exclusively to the allowance of exemplary damages, are expressly waived by appellant in this court. In other words, it is conceded that, under the law and the evidence, the general verdict of the jury, in so far as it embraced only the damages actually sustained by the appellee, must be allowed to stand. But, inasmuch as it appears from the special finding of the jury, in their answer to the interrogatory stated to them in writing by the court, that in their assessment of appellee's damages, in and by their general verdict, they had allowed the appellee for exemplary damages the sum of $200, it is earnestly insisted in this court, by the learned attorneys of the appellant, that to the extent of the sum confessedly allowed by the jury, as and for exemplary damages, the damages assessed by the jury, in and by their general verdict, were both illegal and excessive. While it is admitted that the general assembly of this state, in the enactment of the said 12th section of the aforementioned act, intended to, and did give a right of action to the person mentioned in said section, for the recovery, not only of actual damages, but also of exemplary damages, it is urged by appellant that the general assembly "is prohibited by our constitution from enacting such a law." In support of this position appellant directs our attention to the 14th section of the 1st article of the constitution of this state, which provides that "no person shall be put in jeopardy twice for the same offense." But we fail to see the applicability of this provision of our state constitution to the section of the act now under consideration. We recognize the rule which ordinarily prevails, that, where a given act is, or may be, "the subject of a criminal prosecution and also of a civil action for damages in favor of the party thereby injured, exemplary damages will not be allowed in such action." This rule, however, like most of the rules of civil practice, is a proper subject of legislative action, and the general assembly may well provide in such a case as the case at bar, that the injured party may recover, not only actual damages, but also exemplary damages, and the courts of the state will be bound to carry out and enforce such provision.

In considering this subject, appellant's counsel seem to confound the terms *fine* and *exemplary damages*, and to regard the one as the synonym of the other; but there is a marked and well-defined difference between the meaning of these terms. A fine is an amercement imposed upon a person for a past violation of law; but exemplary damages have reference rather to the future than the past conduct of the offender, and are not given as a compensation to the injured party, but as an admonition to the offender not to repeat the offense. We can not hold in this case that the damages assessed by the jury in their general verdict were excessive, because it appeared from the special finding of the jury that two-fifths of the damages assessed were exemplary damages. And the general question, as to whether the damages in any case are or are not excessive, is one peculiarly within the province of the court below. That court has the opportunity of seeing and, to some extent, knowing parties, witnesses and jurors, and therefore has facilities, that we can not have, for determining whether the verdict is just and right or is the result of passion or prejudice. In this case the court below passed upon the questions presented by appellant's motion for a new trial, including the question of excessive damages, and we can not see that the court below erred in overruling the motion for such new trial.

The judgment of the court below is affirmed at appellant's costs.

TAX TITLES.

CALLANAN v. HURLEY.

Supreme Court of the United States, October Term, 1876.

1. TREASURER'S DEED—EVIDENCE.—A treasurer's deed for lands sold for delinquent taxes in the State of Iowa, if substantially regular in form, is, under the statutes of that state, at least *prima facie* evidence that a sale was made, and if there was a *bona fide* sale, in substance or in fact, the deed is conclusive evidence that it was made at the proper time and in the proper manner.

2. CASE IN JUDGMENT.—In a case where a tax-deed regular in form recited that the land was sold January 4th, and where the treasurer certified that the sales of land for delinquent taxes in the county began on that day, and were continued from day to day until January 18th, and that he entered all the sales as made on the 4th, it was held that a sale of land at any time during the period from the 4th to the 18th was valid, and that recording such sale as made on the first day, though actually made later, did not impair the title.

APPEAL from the Circuit Court of the United States for the District of Iowa.

Mr. Justice STRONG delivered the opinion of the Court.

The plaintiff below asserts title to the lands in controversy by virtue of his having entered them pursuant to the provisions of the act of Congress, and the defendant Callanan claims to be the owner by force of tax-deeds of the treasurer of the County of Cass, founded on the alleged sales made in January, 1864, for delinquent taxes. These deeds having been placed upon record are, as the plaintiff avers, a cloud upon his title, and the object of his bill is to procure their cancellation. He charges that they are void for several rea-

sons: *First*, that no taxes were levied upon the lands, or any of them, for the years for which they were pretended to be sold; *second*, that the taxes, if any there were, never became delinquent; *third*, that there was no person authorized to receive payment of the taxes; *fourth*, that there was no warrant or authority for the sale of the lands for the non-payment of delinquent taxes; and *fifth*, that no sale of the land for the non-payment of taxes, real or pretended, ever took place, but that certificates thereof were issued reciting, contrary to the truth, the sale of the lands conformably to the provisions of the statutes of the state, under which certificates the deeds and conveyances were respectively made. A subsequent amendment of the bill charges, sixthly, that at the time of the pretended assessments and levies the lands were not subject to taxation; and seventhly, that two persons, Reynolds and Mead, (through whom the defendant claims), at and before the issuing of the certificates of sale, unlawfully combined and confederated with the defendant for the purpose of preventing competition at the sale of lands for taxes then to be held in the county.

These are all the objections to the validity of the tax-deeds which the original bill and its amendment suggest. Before examining them it will be convenient to notice the provisions of the statutes of the state respecting tax-sales, and respecting the effect of treasurers' deeds for lands sold for delinquent taxes. They are contained in the revision for 1860, chapter forty-five. After giving directions for sales of land by the county treasurer for delinquent taxes, prescribing notice by advertisement, and providing for the cost of advertising, the treasurer is directed to offer separately on the day of sale each tract or parcel of real property advertised, on which the taxes and costs shall not have been paid, and it is declared that the person who offers to pay the amount of taxes due on any parcel of land for the smallest portion thereof shall be considered the purchaser. The treasurer is directed to continue the sale from day to day as long as there are bidders, or until the taxes are all paid, and, after all has been offered, if any portion of the lands advertised remain unsold, the sale is to be adjourned. The purchaser is entitled to a certificate of purchase describing the property and the amount of the tax, but the land may be redeemed at any time within three years from the day of the sale. At the expiration of three years, if the land remains unredeemed, the purchaser is entitled to a deed from the treasurer, the form and effect of which are defined by the statute. We quote a part of the 784th section of the act as having a controlling operation upon the facts of the present case. It is as follows:

"The deed shall be signed by the treasurer in his official capacity, and acknowledged by him before some officer authorized to take acknowledgments of deeds, and when substantially thus executed and recorded in the proper record of titles to real estate, shall vest in the purchaser all the right, title, interest, and estate of the former owner in and to the land conveyed, * * and shall be *prima facie* evidence in all courts of this state in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts:

"1. That the property was subject to taxation.

"2. That the taxes were not paid before sale.

"3. That the property conveyed had not been redeemed at the date of the deed.

"And shall be *conclusive* evidence of the following facts:

"1. That the property had been listed and assessed.

"2. That the taxes were levied according to law.

"3. That the property was advertised for sale in the manner and for the length of time required by law.

"4. That the property was sold for taxes as stated in the deed.

"5. That the grantee named therein was the purchaser.

"6. That the sale was conducted in the manner required by law.

"7. That all the prerequisites of the law were complied with by all the officers, * * except in regard to the *three* points named in this section, where the deed shall be *prima facie* evidence only.

"And in all controversies involving the title held under such tax-deed executed substantially as required by law by the treasurer, the person claiming title adverse thereto, in order to defeat the same, *must* show, either that said property was not subject to taxation, or that the taxes had been paid before sale, or that the property had been redeemed from sale according to law. * * And no person shall be permitted to question the title under the deed without first showing * * *that all taxes due upon the property have been paid.*" *ss.* 784.

The whole act exhibits an intention of the legislature to enforce the payment of taxes, by securing purchasers at tax-sales in their purchases, and thus making it dangerous for owners of property to neglect payment of taxes due the state. It removes difficulties which had before existed in the way of establishing a tax-title, and at the same time it works no injustice to owners of land subject to taxation. The law determines when the taxes should be levied, and when they shall be paid, and it gives ample time within which to make the payment. It was under this act and in conformity with its provisions that the treasurer's deeds were made, through which the defendant below made his claim. They are in the form prescribed by the statute. If the act is to have any effect at all, it is plain that the deeds cut off most of the averments upon which the plaintiff bases his attempt to obtain the cancellation he seeks. It is not open to him to aver and prove any allegation he puts forward to establish the invalidity of the deeds, except that the property was not subject to taxation, and that there was a fraudulent combination of the defendant with others to prevent bidding. The first of the averments is denied in the answer, and there has been no attempt to sustain it by evidence. Besides, the statute declares that the deeds shall be *prima facie* evidence that the property was subject to taxation. They are made affirmative evidence. The allegation of a fraudulent combination to suppress bidding at the sale is entirely unsustained by anything in the proofs, and so is every allegation upon which the bill founds the charge that the deeds are invalid, unless it be the averment that no sale for the non-payment of taxes, real or pretended, ever took place. The treasurer's deeds, however, contain a recital that he did, on the 4th day of January, A. D. 1864, by virtue of the authority vested in him by law, at the sale begun and publicly held on the first Monday of January, A. D. 1864, expose to public sale at the courthouse in the county aforesaid, (Cass), in substantial conformity with all the requisitions of the statute in such cases made and provided, the several pieces of real property above described separately, for the payment of the taxes, interest, and costs then due and remaining unpaid on each of said pieces of real property respectively. The deeds further recite that at the time and place aforesaid the persons to whom the deeds were made offered the most favorable bids, and that the several pieces of property were stricken off to them at the prices bid.

Now, if it be conceded that under the statute the deeds containing these recitals are only presumptive evidence that the sales were actually made as recited, the burden is still on the plaintiff to rebut this pre-

sumption. And we think that instead of having rebutted it, the evidence in support of the presumption greatly preponderates. We need not refer to it in detail. Suffice it to say that there is not a single witness who is able to deny that a sale was made, and only one is able to testify that ten years after 1864 he can not recollect it, while others testify affirmatively that it was made. At the treasurer's sale in January, 1864, there were large bodies of land offered, and the sale was continued from day to day. Whether the lands now in dispute were sold on the fourth day of the month or at a later day during the sale is, perhaps, not distinctly proved, and it is not necessary that it should be. If they were not sold until several days later, but yet while the sales were in progress, unadjourned, and the treasurer certified them as sold on the opening day, it was at most but an irregularity, which can not avail the plaintiff. It has not interfered with his right to redeem. He suffered eight years to pass after the sale without asserting any right. During all that period he paid no taxes, performed no duties which he owed to the public, suffered the defendant, and those under whom the defendant claims, to pay the taxes levied from year to year, and now, when it may be presumed the land has increased in value, he seeks the cancellation of the tax-deeds, without even offering to redeem or to refund the taxes which the purchasers at sale have paid. He seeks this in the face of a statute which in effect declares that irregularities shall not suffice to defeat a tax-sale, and when in view of the evidence it is exceedingly doubtful, whether in fact there was any irregularity. In this attempt he can not succeed.

All the questions presented in this case have been decided by the Supreme Court of Iowa, and decided adversely to the plaintiff. Phelps v. Meade *et al.*, 41 Iowa, 470. That case was an attempt to set aside a tax-deed of land sold by the treasurer of Cass County at the sale in January, 1864. The averments of the bill were the same as those made in this case, and the case was heard upon the evidence taken upon the case now before us. The rulings of the court were that, if there was a *bona fide* sale in substance or in fact, the tax-deed is conclusive evidence that it was made at the proper time and conducted in the proper manner. And where a tax-deed, regular in form, recited that the land was sold January 4th, and the treasurer testified that the sales of land in the county for delinquent taxes began upon that day and were continued until the 18th, and that he entered all the sales as of the date of the commencement, it was held that a sale of land at any time during the continuance of the sale was valid, and that the recording of the sale as of the first day would not impair the title.

We do not find in the unreported case of Butler v. Delano, to which we have been referred, anything conflicting with what was decided in Phelps v. Meade. The facts of the two cases, so far as we can gather them from the opinion of the court in the latter, were widely different. The same may be said of the other unreported case of Thompson v. Ware *et al.*

The decree of the Circuit Court is reversed, and the cause is remitted with instructions to dismiss the plaintiff's bill.

THE senate of Nevada has passed a bill to tax the profits of churches, secret societies and colleges, and exempt mortgages.

LORD CHIEF JUSTICE COCKBURN, while on circuit lately, expressed himself very strongly with regard to the Statute of Frauds, declaring that, though intended to prevent fraud, it caused more fraud than any mind could possibly conceive. If any member of the Legislature would take upon himself to move for the repeal of this statute, he would do great service to the country.

THE GRANGER CASES—REGULATION OF RAILROAD RATES.

CHICAGO, BURLINGTON & QUINCY R. R. v. CUTTS *ET AL.*

Supreme Court of the United States, October Term, 1876.

1. RAILROAD COMPANIES—PUBLIC INTEREST—CHARTERS.—Railroad companies are engaged in a public employment affecting the public interest, and are subject to legislative control as to their rates of fare and freight, unless protected by their charters.

2. TRANSFER OF PROPERTY BEFORE REGULATIONS MADE.—That, before the power of regulation was exercised, the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent, does not alter the case.

3. A CHARTER A CONTRACT.—The charter of a corporation is a contract within the meaning of that clause of the Constitution which prohibits a state from passing any law impairing the obligation of a contract.

4. THE IOWA CONSTITUTION.—The statute in question, dividing the railroads of the state into classes and establishing a maximum of rates for each class, is not in conflict with sec. 4, art. 1 of the Constitution of Iowa, which provided that "all laws of a general nature shall have a uniform operation, and that 'the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.'"

APPEAL from the Circuit Court of the United States for the District of Iowa.

Mr. Chief Justice WAITE delivered the opinion of the Court:

Railroad companies are carriers for hire. They are incorporated as such and given extraordinary powers, in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in Munn *et al.* v. The People, 4 Cent. L. J. 250, just announced, subject to legislative control as to their rates of fare and freight, unless protected by their charters.

The Burlington and Missouri River Railroad Company, the benefit of whose charter the Chicago, Burlington and Quincy Railroad Company now claims, was organized under the general corporation law of Iowa, with power to contract in reference to its business, the same as private individuals, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but being subject, nevertheless, at all times to such rules and regulations as the General Assembly of Iowa might from time to time enact and provide. This is in substance its charter, and to that extent it is protected as by a contract; for it is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the Constitution of the United States, which prohibits a state from passing any law impairing the obligation of a contract. Whatever is granted is secured, subject only to the limitations and reservations in the charter or in the laws or constitution which govern it.

This company, in the transactions of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes

maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit and make it a part of the charter, and if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference. But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation.

It is a matter of no importance, that the power of regulation now under consideration was not exercised for more than twenty years after this company was organized. A power of government which actually exists is not lost by non-user. A good government never puts forth its extraordinary powers except under circumstances which require it. That government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people.

In 1691, during the third year of the reign of William and Mary, Parliament provided for the regulation of the rates of charges by common carriers. This statute remained in force, with some amendment, until 1827, when it was repealed, and it has never been re-enacted. No one supposes that the power to restore its provisions has been lost. A change of circumstances seemed to render such a regulation no longer necessary, and it was abandoned for the time. The power was not surrendered. That remains for future exercise when required. So here, the power of regulation existed from the beginning; but it was not exercised until, in the judgment of the body politic, the condition of things was such as to render it necessary for the common good.

Neither does it affect the case that, before the power was exercised, the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. After the pledge and after the lease, the property remained within the jurisdiction of the state, and continued subject to the same governmental powers that existed before.

The objection that the statute complained of is void, because it amounts to a regulation of commerce among the states, has been sufficiently considered in the case of Munn *et al.* v. The People, *ante*. This road, like the warehouse in that case, is situated within the limits of a single state. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as interstate commerce, and until Congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected.

It remains only to consider whether the statute is in conflict with Sec. 4, Art. I, of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and that "the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The statute divides the railroads of the state into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires. The Supreme Court of the State, in the case of McAunich v. M. & M. R. R. Co., 20 Ia. 343, in speaking of legislation as to classes, said: "These laws are general and uniform, not because they operate upon every person in the state, (for they do not), but because every person who is brought within the relation and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." This act does not grant to any railroad company privileges or immunities which, upon the same terms, do not equally belong to every other railroad company. Whenever a company comes into any class, it has all the "privileges and immunities" that have been granted by the statute to any other company in that class.

It is very clear that a uniform rate of charges for all railroad companies in the state might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads, and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done, is not for us to decide. Our province is only to determine whether it could be done at all and under any circumstances. If it could, the legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done.

We find no error in the decree below, and it is, therefore, affirmed.

CHICAGO, MILWAUKEE & ST. PAUL R. R. v. ACKLEY *et al.*

IN ERROR to the Circuit Court of the County of Milwaukee, State of Wisconsin.

Mr. Chief Justice WAITE delivered the opinion of the Court:

The only question presented by this record is, whether a railroad company in Wisconsin can recover for the transportation of property more than the maximum fixed by the act of March 11, 1874, by showing that the amount charged was no more than a reasonable compensation for the services rendered.

What we have already said in the cases of Peik & Lawrence v. The C. & N. W. R. R. Co. is applicable to this case. As between the company and a freighter, the maximum of the statute is the limit of the recovery for transportation actually performed. If the company should refuse to carry at the prices fixed, and an attempt should be made to forfeit its charter on that account, other questions might arise, which it will be time enough to consider when they are presented. But for goods actually carried the limit of the statute is the limit of recovery.

The judgment is affirmed.

WINONA & ST. PETER R. R. v. BLAKE *et al.*

IN ERROR to the Supreme Court of the State of Minnesota.

Mr. Chief Justice WAITE delivered the opinion of the Court:

By its charter the Winona & St. Peter Railroad Company was incorporated as a common carrier, with all the rights, and subject to all the obligations that name implies. It was, therefore, bound to carry when called upon for that purpose, and charge only a reasonable compensation for the carriage. These are incidents of the occupation in which it was authorized to engage. There is nothing in the charter limiting the power of the state to regulate the rates of charge. The provision in the act of February 28, 1866, that the "company shall be bound to carry freight and passen-

gers upon reasonable terms," and that in the Constitution of Minnesota (Art. X, Sec. 4), "all corporations being common carriers, * * shall be bound to carry the mineral, agricultural, and other productions or manufactures on equal and reasonable terms," add nothing to, and take nothing from the grant, as contained in the original charter. This case, therefore, falls directly within our rulings in Munn *et al.* v. The People, *ante.*; C. B. & Q. R. R. Co. v. Cutts, Peik v. C. & N. W. R. R. Co., and C. M. & St. P. R. R. Co. v. Ackley, just decided.

The judgment of the Supreme Gourt of Minnesota is consequently affirmed, for the reasons stated in the opinions read in those cases.

McILRATH, RECEIVER, ETC., v. COLEMAN.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

Mr. Chief Justice WAITE delivered the opinion of the Court:

This case, in all its essential facts, is precisely like that of W. & St. P. R. R. Co. v. Blake, just decided. The judgment of the Circuit Court is, therefore, affirmed upon the authority of that case and for the reasons stated in the opinions which have just been read.

TONNAGE DUTY—WHARFAGE FEES.

CITY OF KEOKUK v. KEOKUK NORTHERN LINE PACKET CO. CITY OF FORT MADISON v. SAME. CITY OF BURLINGTON v. SAME.

Supreme Court of Iowa, December Term, 1876.

HON. WM. H. SEEVERS, Chief Justice.
" JAMES G. DAY,
" JAMES H. ROTHROCK,
" JOSEPH M. BECK,
" AUSTIN ADAMS, } Judges.

1. TAX UPON COMMERCE — WHARFAGE FEES — WHEN CONSTITUTIONAL.—The constitution and laws of the United States prohibit the levying of taxes upon the commerce of the country, in the way of duties upon exports and imports and imposts upon vessels engaged in commerce. Whatever may be regarded as taxes of this character or may abridge the free use of the Mississippi is unconstitutional. But a city is not prevented from charging a reasonable compensation for the use of wharves erected by it for the convenience of commerce. A municipal ordinance, which provides for wharfage-fees which are not excessive, can not be regarded as a regulation affecting prejudicially the interests of commerce or freedom of the river upon which the wharves are constructed. Such wharfage-fees are not to be regarded as a tax; they are levied as a compensation for the use of the wharves.

2. THAT THE WHARFAGE-FEES are graduated by the tonnage of the vessels does not affect the rule that a city may charge a reasonable compensation for the use of its wharves.

3. WHAT IS A WHARF — JUDICIAL NOTICE.—A street paved and extending into the river is none the less a wharf. The court will take judicial notice that the wharves of the Mississippi are constructed in this manner.

4. THE DEFENSE THAT the fees are excessive must be specially pleaded.

5. WHEN FEES VALID—JUST COMPENSATION.—If fees be authorized by a municipality on commerce etc., amounting to a tax upon commerce and beyond just compensation for the use of improved wharves, they can not be collected. To be valid, they must be within the limits of just compensation.

6. POLICE POWERS OF MUNICIPALITY—REGULATION OF BOATS.—A municipality in the exercise of its police powers may control the landing of boats by designating the place where they shall receive or discharge freight or passengers, and charge a reasonable compensation therefor.

7. CONSTRUCTION OF STATUTES.—Statutes partly in conflict with the constitution will be held void only as to those parts which are unconstitutional. This rule is extended to the case of a statute or ordinance authorizing two or more acts, one of which is within and the other without legislative authority.

APPEALS from Lee and Des Moines District Courts:

These are actions by the respective plaintiffs to recover charges for wharfage, claimed to be due each under ordinances of the several cities providing therefor. The several petitions allege that defendant is indebted to the respective plaintiffs by reason of its boats landing at and using the wharves of each. The pleadings in each case being different, their substance and import must be separately set out. In the first case the petition alleges that the city of Keokuk is empowered by its charter to establish and regulate wharves, and to fix the rates of wharfage for all boats landing or moored at such wharves; that, at great expense, it erected wharves upon the river within its limits, and expended large sums in making additions thereto and keeping them in repair; that, in order to raise money for such outlays, the city issued bonds, which were negotiated, and, to meet the interest and principal thereof, the city by ordinance fixed a wharfage fee, to be paid by each boat or vessel using the wharves; that the boats of defendant landed at the wharves so constructed and improved by the city, and there received and discharged freight and passengers. The petition seeks to recover wharfage, under the city ordinance, to the amount of the fees prescribed therein. The other pleadings in the case are set out in the abstract, upon which the case is submitted, in the following language: (Printed matter omitted by order.) And, the defendant standing on its answer, judgment was rendered for plaintiff.

2. In the second case the petition, in proper form, claims to recover wharfage under an ordinance therein pleaded, containing the following provisions: (Printed matter omitted by order.) The other pleadings and proceedings in the case are set out in the abstract, upon which the case is presented in this court, as follows: (Printed matter omitted by order), and because in law said ordinances of plaintiff are legal and binding on defendant. The demurrer was sustained, and, defendant standing on its answer, judgment was rendered for plaintiff.

3. In the third case the petition, in addition to other allegations, avers that plaintiff is the owner of, and at great expense has paved and otherwise improved, a certain wharf within its limits, for the purpose of creating and securing to steamboats landing at said city a convenient and secure wharf or landing-place; "that * * * defendant landed at said wharf with its steamboats" (stating the names of the boats and the number of landings, and the charges therefor), and "that, under the law of Iowa, it is authorized to construct and regulate wharves, and to fix the fee or wharfage for landing thereat;" and, in consequence of said authority, the city passed the following ordinances providing for wharfage and fixing the rate of the same: (Printed matter omitted by order.) The second count of defendant's answer to plaintiff's petition is in the following words: (Printed matter omitted by order.) To this count of the answer plaintiff demurred, on the ground that it presented no defense in law to plaintiff's claim. The demurrer was sustained, and, defendant standing on its answer, judgment was rendered against it.

Judgment having been entered against the defendant in the several cases, it appeals in each.

Gilmore & Anderson and *James H. Davidson*, for appellant; *John Gibbon*, for appellee, City of Keokuk.

Casey & Hobbs and *A. J. Alley*, for appellee, City of

Fort Madison; *Samuel K. Tracy*, for appellee, City of Burlington.

BECK, J., delivered the opinion of the court:

The same question is presented in these cases, and involves the validity of the ordinances of the several cities which are plaintiffs in the respective actions under which wharfage-dues are claimed of defendant. It is insisted that these ordinances are in conflict with several provisions of the Constitution of the United States, of the ordinance of 1787, and of the organic law of Wisconsin and Iowa, which forbid a state imposing imposts and duties on imports or exports and duties of tonnage; which forbid the states from regulating or levying taxes upon commerce, and which declare that the Mississippi River shall be a common highway, forever free to all the citizens of the United States, without any tax, duty, impost or toll therefor. Const. U. S., art. 1, §§ 8, 9, 10; Ordinance 1787, art. 4; Organic Law of Wis. Territory, Act April 20, 1836, § 12; Act admitting Iowa into the Union, Mar. 3, 1845, sec. 3.

If the ordinances of the three cities which are brought in question in these actions are in contravention of any of these constitutional or statutory provisions of the United States, they are invalid, and no act or authority done or exercised under them can be supported. It becomes necessary to inquire first as to the character and nature of the charges or fees called wharfage, which the respective plaintiffs seek in the several actions to recover.

It will be observed, by an examination of the pleadings in the cases, that each city has erected wharves or steamboat-landings upon the margin of the Mississippi River within its boundaries, for the use of steamboats and other vessels receiving and discharging freight and passengers at such city. The pleadings show, in each case, that the charges sought to be recovered under the name of wharfage are for the use of wharves or landings constructed and owned by the respective cities, at which defendant's steamboats had made landings and received and discharged freight and passengers. In the first and third cases the petitions allege the construction of the wharves at which defendant's boats landed by the respective cities, the outlay of money by the cities for their construction and repair, and their ownership by the municipalities. These allegations are not denied; but the defense pleaded to the action is that the several ordinances are in conflict with the Constitution. The defendant claims that it is not liable, under these ordinances, to wharfage for the use of wharves erected by the cities, kept in repair by them. This is the undoubted position assumed by the pleading.

In the second case the defendant alleges in its answer "that the city of Fort Madison had not built any wharf for the accommodation of boats landing at the city; that they have in places paved the streets to the river, used by the citizens generally for all purposes of a street, for ferry-landing, for pulling lumber from rafts, and that the streets so paved by the city have been used by this defendant for a landing-place; they (defendant) have generally landed at the place designated by the wharfmaster of plaintiff, which was at the part of the street which had been paved by the city of Fort Madison." It is very plain that the paved street at which defendant's boats were landed comes within the designation of a wharf, which is constructed of stone and earth or timber, for the convenience of vessels in landing. Where there is a tide, or where it is demanded by the nature of the water upon which the wharf is built, it extends into the bay or stream. When there is little variation and sufficient depth of the water, and a smoother surface, the wharf is constructed of stone or timber upon the beach, so that the vessel may lie broadside to the shore. As a matter of fact, of which we will take notice, all wharves upon the Mississippi River in this state are constructed in the manner last described. If it be constructed upon, or is an extension of, the street into the river, it is none the less a wharf. The answer of defendant clearly shows that it landed its vessels at such a wharf built by the city of Fort Madison. We are amply justified in holding that the pleadings in each case show that defendant used a wharf in each city, constructed and owned by the city for the use and accommodation of steamboats and other vessels.

No objections to the judgment can be well founded on the ground that the petitions in these cases do not claim to recover for the reasonable and just value of the use of the wharves, but for the wharfage-fees fixed by the ordinances. If these ordinances prescribed that each boat landing at an improved wharf should pay the fees fixed therein, and contained no provisions for collecting wharfage, except where boats landed at improved wharves, the actions could be maintained for the wharfage-fees for these reasons. The ordinances would be valid, if the wharfage-fees did not exceed just compensation for the use of the wharves. This can not be doubted. The fees should be fixed and certain, and so graduated as to be equal upon all boats. The amount in each case should not be left to the caprice or judgment of the officer of the city collecting the fees.

The power of the cities to fix by ordinance charges for wharfage, within the limits of just compensation, is recognized in Cannon v. New Orleans, 20 Wall. 577 (582). The only defense that could be made to the enforcement of valid ordinances of the character supposed, would be that the fees prescribed exceed just compensation, and therefore operate as a tax upon commerce. The right to recover under the ordinance the fees prescribed therein, if a reasonable charge for the use of the wharves, would be admitted. The defense, therefore, that the fees are excessive, should be pleaded. But in these cases the defendant has set up no such defense. Now, if the ordinances are valid as to the wharves actually improved, which we shall hereafter see must be held, they may be enforced, unless the defendant pleads and proves that the charges therein prescribed are beyond the limit of just compensation.

The question raised in the pleadings involves the validity of the ordinances. It is not denied that, if confined in their operation to wharves actually improved, they are valid. Defendant can not claim that they must be held invalid because plaintiffs have not averred in their petitions that the wharfage-fees are reasonable. The answers of defendants, to which the plaintiffs demur, set up that the ordinances are wholly void—void for every purpose. The questions before us arise upon plaintiffs' demurrer. Now, if it be found that the ordinances are not wholly void, but are valid to sustain wharfage-fees for the use of wharves actually improved, the demurrer is well taken.

It may be remarked, in this connection, that the danger of fees and charges being levied under ordinances of the character of those involved in these actions, whereby commerce may be affected, is purely imaginary, and does not in fact exist. If fees be authorized, amounting to a tax upon commerce, being beyond just compensation for the use of improved wharves, they can not be collected. To be valid, they must be within the limits of just compensation.

The question presented for our decision, under the pleadings in these cases, is this: Are the ordinances of the plaintiffs, providing for the collection of wharfage-fees for the use of wharves built and owned by the respective cities, in conflict with the provisions of the

Constitution and Laws of the United States? These provisions are all intended to prohibit the levying of taxes upon the commerce of the country, in the way of duties upon exports and imports, and imposts upon vessels engaged in commerce. The doctrines of the numerous cases cited by defendant's counsel, interpreting these provisions, are familiar. Whatever may be regarded as taxes of this character, or may abridge the free use of the Mississippi River by all the citizens of the United States, is in conflict with the laws, constitutional and statutory, of the Union. Gibbons v. Ogden, 9 Whart. 1; Brown v. Maryland, 12 Whart. 419; Smith v. Turner, 7 How. 283; Sinnot v. Davenport, 22 How. 227; Almy v. California, 24 How. 169; Steamship Co. v. Port Wardens, 12 Wall. 204; Peele v. Morgan, 19 Wall. 538; Cannon v. New Orleans, 20 Wall. 577; Hackley v. Geraghty, 34 N. J. 332; People v. Raymond, 34 Cal. 492. But the rule of these cases does not prevent a city from charging a reasonable compensation for the use of wharves erected by it for the convenience of commerce. And this is held in express words in Cannon v. New Orleans, 20 Wall. 577 (582.)

Wharves are necessary or convenient for vessels engaged in commerce, and when provided, though proper and reasonable charges are required for their use, they aid the prosecution of commerce. A municipal ordinance, therefore, which provides for wharfage-fees which are not excessive, can not be regarded as a regulation affecting prejudicially the interests of commerce, or the freedom of the river upon which they are constructed. Such wharfage-fees are not to be regarded as a tax. They are levied as a compensation for the use of the wharves. In the exercise of their police powers, the cities of the state may control the landing of boats, designating the place where they shall receive or discharge freight or passengers. It is within their power to require this to be done at their wharves, and to charge reasonable compensation therefor. The City of Dubuque v. Stout, 32 Ia. 85. This doctrine is founded upon the clearest reason, well understood by all persons familiar with the transaction of business upon the Mississippi River.

It can not be doubted that wharves are not only convenient, but necessary for the transaction of business with vessels navigating the river. They are necessary to enable consignees to receive and remove their goods, and protect them from loss. The banks and margins of the river are, in most cases, of clay and alluvion. Goods delivered from vessels upon them in their natural state could not be handled, and would be subject to injury on account of their muddy and swampy character. We have seen that cities may build wharves and charge for their use a sum that would be a just compensation. Now, unless they have power to compel vessels to land at the wharves, the masters of vessels, in order to escape payment of wharfage-fees, may discharge and receive cargoes at the natural banks of the river, to the inconvenience and loss of shippers and consignees. This power is necessary to enable the cities to exercise their police authority in providing places for the landing of vessels. It has never been doubted that the police power of the state, exercised through the municipal corporations, may regulate in this way transactions connected with commerce. We will not be expected to cite authorities in support of a doctrine so familiar. It is fully recognized in the case which we now proceed to consider.

Cannon v. New Orleans, 20 Wall. 577, is confidently relied upon by defendant to support its claim of exemption from wharfage-fees, provided for by the ordinances of the cities brought in question in these actions. It was decided upon the following facts. The city of New Orleans made an ordinance providing that, "from and after the first day of January, 1853, the levee and wharf dues on all steamboats which move or land in any part of the city of New Orleans, shall be fixed as follows: Ten cents per ton if in port not exceeding five days, and five dollars per day after said five days shall have expired." Under this ordinance the action was brought, to recover back money paid by the owner of a steamboat and to enjoin further collection under the ordinance. The United States Supreme Court held the ordinance invalid; regarding the dues collectable under it as a tax, not as compensation for the use of the wharf. This language is used: "A tax which, by its terms, is due from all vessels arriving and stopping in a port, without regard to the place where they may stop, whether it be in the channel of the stream, or out in a bay, or landed at a natural river-bank, can not be treated as a compensation for the use of a wharf." In the cases before us, the wharfage-fee is charged only against vessels landing or moving to the wharves or to any vessels, or, as in the last case, moving within 100 feet of the wharves. But, the controlling point of difference between that case and these now before us, is this: In these it appears, that defendant did use the wharves erected by the cities, and there is no claim that the wharfage-fees sought to be recovered are unreasonable. It does not appear that in Cannon v. New Orleans the boat-owner used any wharf in the city; at all events, the fact that he did moor his vessel to the city-wharf was not relied upon to support the right of recovery, and no question based thereon was presented to the court.

But it is claimed the ordinances in the case before us are void, because they provide for wharfage-fees, where boats are not moored to a wharf; that all the river-bank within the city is declared to be wharves, and the city can not exact compensation from vessels, that land at the bank, where no wharves have been constructed. There are two answers to this objection. The first is that, under The City of Dubuque v. Stout, 32 Ia. 85, the city may control the landing of vessels; fixing places, by ordinance or otherwise, where they shall receive and discharge freight and passengers. The ordinances in these cases are intended to have the effect of preventing boats, in order to escape charges lawfully made for the use of a wharf, from discharging and receiving freight at places where no wharves have been constructed, which would be to the inconvenience and loss of shippers and consignees. The other answer is this: Statutes which are partly in conflict with the Constitution, will be held void no farther than as to those parts which are unconstitutional; provisions which are within the limits of legislative authority will be enforced. Santo v. The State, 2 Ia. 167; Walters v. Steamboat Mollie Dozier, 24 Ia. 192; The City of Des Moines v. Lyman, 21 Ia. 153; Childs v. Shower, 18 Ia. 261; High School v. County of Clayton, 9 Ia. 175; The County of Louisa v. Davison, 8 Ia. 517; The Dist. Tp. of Dubuque v. Dubuque, 7 Ia. 262; Duncan v. Sigler, Morris, 39. City ordinances, like statutes, will be upheld to the extent of provisions authorizing the exercise of power clearly within the scope of the municipal authority, while other provisions, in excess of such authority, will be held void. Dill. Mun. Corp. § 354, and notes. But if the parts of the statute or ordinance be necessarily connected and dependent, the whole must fall with the void part.

The rule must be extended to the case of a statute or ordinance authorizing two or more acts, one of which is within and the other without legislative authority. The first act, when done under such statute or ordinance, will be valid, the second void.

The several ordinances of the respective cities, it is insisted by defendant, authorize the collection of wharfage-fees from boats that do not land at the

wharves of the cities. This, for the purpose of the argument, may be admitted. They authorize the collection of the fees in cases where boats use the wharves owned by the cities. The collection of the fees in the first case, it may be here conceded, is not within municipal authority; in the second case it is not forbidden by the Constitution and Laws of the United States. It may be done in the first, but is forbidden in the last.

The doctrines presented in these views are most infrequently applied to taxation. Where taxes are levied by the same ordinance or act of a corporation, some of which are not authorized by its charter, these would be void; those within the corporate powers would be valid.

The point upon which we base our decision in these cases, namely, that the cities under the ordinances may recover for the actual use of improved wharves, was not made nor decided in Cannon v. New Orleans. The question discussed and decided in that case was whether the ordinance of New Orleans, in its full breadth, was valid. The Supreme Court of Louisiana held it valid in its every provision, and to its full extent. It was not claimed by the United States Supreme Court that it would be valid against vessels using improved wharves, and void as to vessels moored in the stream, or landing at the natural bank of the river. We may not inquire why the point raised in these cases was not presented and discussed in that. It is sufficient to know that it was not, and, of course, no discussion was made thereon. The case is, therefore, not authority against the conclusion we reach, but, as we have pointed out, is in harmony therewith.

The wharfage-fees provided by the ordinances of the cities of Keokuk and Burlington are based upon and fixed by the tonnage of the vessels landing at the wharves. It is insisted that this is a tonnage duty, and is obnoxious to art. 1, § 10, p. 2 of the Constitution of the United States, which forbids the imposition by the states of such imposts.

It must be admitted that the constitutional inhibition is directed against taxation, and is intended to protect the cargoes of vessels engaged in commerce therefrom. Imports and exports may be subjected to duties by charges levied upon vessels engaged in commerce. This is simply a form of taxation. The Constitution, in the clause inhibiting duties upon tonnage, in terms forbids taxes levied in that manner. The word *duty* means a tax, toll, impost or custom.

The wharfage-fee charged under the city ordinances in question is in no sense a tax. It is a charge made as compensation for the use of the wharves built and maintained for the benefit of vessels engaged in commerce. The distinctions between such a charge and a tax, toll, impost or custom is too obvious to admit of discussion.

The fact that the wharfage-fee is graduated by the tonnage of the vessel does not require us to regard it as a "duty on tonnage." The tonnage of the vessels using the wharves of the cities affords a convenient and just measure of the fees charged, which should be varied according to the size of the boats; the larger occupying more river space at the wharves than those of less capacity.

The foregoing discussion disposes of all points presented in the several cases. The judgment in each is affirmed.

SEEVERS, C. J., dissenting:

My reasons for dissenting from the foregoing opinions are:

1. The right to recover a reasonable compensation is based on the fact that the boats of the defendant landed at the constructed wharves. There is no count in the petitions basing the right to recover on a *quantum meruit*.

The theory upon which a recovery is sought is that the plaintiffs possessed the power to establish and construct wharves; that, by ordinance, such have been established and constructed, and a compensation for their use fixed thereby. It is that compensation, fixed by the ordinance, for which a recovery is sought in these actions, and not a reasonable one for the voluntary use of wharves constructed by the city.

The compulsory use of anything can never be the basis of a reasonable compensation for its use. Under the ordinances, the defendant was compelled to pay just as much, if the vessels were landed anywhere in the city limits, or anchored in the stream, as at the constructed wharf. Whatever ought to be the rule under proper pleadings, as to the recovery of a reasonable compensation, no such question is presented in the record in these cases.

2. I am unable to distinguish the ordinances in question from that in Cannon v. New Orleans, 20 Wall. 577.

The port of New Orleans was twenty miles in length and the constructed wharf only two. But this fact was not deemed material by the court. If, however, it was of importance, the proportion of established to constructed wharf in the Ft. Madison case is fully as great as in the New Orleans case; the established wharf being about two miles and the constructed about six hundred feet.

The ordinances in all the cases constitute the whole city-front a wharf, and in one case the wharf extends to the middle of the main channel of the river, and in another to one hundred feet in front of any public landing. It is not shown in either of these cases, along how much of the city-front wharves have been constructed. If such wharves extend the whole length of the city-front, the plaintiff should have so averred. The burden was on the plaintiff to establish such fact. It does not appear, whether the vessel landed at the constructed wharf or not in the New Orleans case. It follows, however, that this circumstance, in the opinion of the court, made no difference, or it would have been alluded to. If the vessel landed, in the New Orleans case, at the constructed wharf, then, according to the opinion of the majority of this court, the judgment should have been in favor of the city. Evidently, this fact, in the opinion of the Supreme Court of the United States, was not deemed material. It is intimated, as the city has, under the police power, the right to compel vessels to land at certain designated places within the limits of the city-frontage, that it necessarily follows, they may be compelled to land at a constructed wharf, and compensation collected therefor. I do not impugn the correctness of the rule laid down in Dubuque v. Stout, 32 Ia. 85; but I do deny that any such consequence as compensation for the use of the wharf follows. That case had nothing whatever to do with the subject under consideration. The decision is based solely on the police power and has no bearing on the question, whether these ordinances are void because in conflict with the Constitution of the United States. Even if wrong in this, I recognize the principle that in this class of questions the decisions of the Supreme Court of the United States are conclusive in this court. As I have said, these cases can not be distinguished from the New Orleans case, and this court is bound thereby. It is said in that case: "The tax is, therefore, collectable for vessels which land at any point on the banks of the river without regard to the existence of wharves." The same result must follow in the cases at bar; for the facts and purport of the ordinances are identical. It is also said in that case: "The tax is also the same for a vessel which is moored in any part of the port of New Orleans, whether she lies

up to a wharf or not, or is located at the shore or in the middle of the river." Here again the same result must follow; for the ordinances in this respect are identical. It is further said in that case: "A tax, which by its terms is due from all vessels arriving and stopping in a port without regard to the place where they may stop, whether it be in the channel of the stream or out in the bay, or landed at a natural river-bank, can not be treated as a compensation for the use of a wharf."

Here again the cases at bar fulfill exactly all the conditions and limitations above stated. In the opinion of the majority of the court, stress is laid on that portion of the opinion in the New Orleans case which intimates that a reasonable compensation may be recovered for the use of a constructed wharf. What is meant in that case as to such recovery is simply this. The power of the city is likened to that of an individual, and if the city, under its charter, has the power and does construct a wharf, a reasonable compensation may, by ordinance, be collected from vessels using it. But the city can not by ordinance establish a wharf, construct it, and then provide that vessels landing at the natural bank of the river or mooring in the stream shall pay wharfage-dues. Such dues are neither more nor less than a tax for stopping in port, and not compensation for the use of the wharf.

If, under the police power, vessels may be required to land at the constructed wharf, and the right to compensation follows because of this compulsory use, then the Constitution of the United States is but a rope of sand, and vessels engaged in commerce on the navigable waters of the country are at the mercy of every municipality located on the borders of the stream. Such power might be so exercised as to annihilate and destroy the commerce of the Mississippi River.

It is maintained that one part of the ordinances may be held valid, even though another portion be void. While I concede there is such a rule, I deny its application to the ordinances in question, for the reason that there is but a single subject-matter contemplated thereby. There is nothing said as to constructed wharves or any charge made for landing vessels thereat; nor do they contain two separate prohibitions, relating to different acts, with distinct penalties for each. I am therefore unable to see how one part can be held valid when another part is void, or rather, how the subject-matter can be separated or divided by judicial construction, when the ordinances define and contemplate but a single subject-matter as a distinct whole.

The length of this dissent forbids that I shall farther enlarge on this subject. In my opinion the judgment of the court should be reversed.

NOTE.—The conclusion of the majority of the court in this case is in accord with the recent decision in the United States Circuit Court for the Eastern District of Missouri, in Northwestern Union Packet Co. v. City of St. Louis, and several other cases, decided at the same time, and reported in 3 Cent. L. J. 58. On the other hand, in a case decided last month by Hill, J., in the United States Circuit Court for the Southern District of Mississippi, Tobin *et al.* v. The City of Vicksburg, a contrary opinion was held. In this case the city of Vicksburg had, on July 12th, 1865, passed an ordinance taxing "all steamboats passing or re-passing, for each landing, $10; for each steamboat exceeding 1,000 tons burden, $1 additional for every 100 tons excess." It further provided that any officer commanding such a vessel, who shall be convicted before the mayor of said city, of having refused to comply with this ordinance, should pay $50 and cost, and said boat should be charged at the rate of $100 for each landing thereafter, until the claim is settled. In an action of assumpsit to recover $5,400, paid under this ordinance, the ordinance was held to contravene the Constitution of the United States, and to be therefore null and void. "By the Constitution," said the learned Judge, "Congress alone is invested with the right to regulate commerce among the states, and the latter are prohibited from imposing any duty of tonnage without the consent of Congress. The Mississippi River is one of the great highways of commerce in the United States. That the plaintiffs' vessels, for the landing of which this wharfage-tax was imposed and collected, were largely engaged in the transportation of articles of commerce between the states bordering upon this great river, is not questioned. The right of plaintiffs to navigate the river with their vessels included the right to land at its banks, as required by the necessities of the business in which they were engaged. The public interest is concerned in the protection of commerce vouchsafed by the Constitution of the United States; and the law of any state or municipality interfering with or obstructing it in a manner prohibited should be unhesitatingly denounced as null and void by the courts. The ordinance, by its terms, imposes this tax for the privilege of '*landing at the city of Vicksburg*,' and not for the use of the city's wharves. It applies as well to a landing at the wharfboat or upon the private property of any citizen. The tax is imposed for the *privilege of stopping at Vicksburg*. To acknowledge the validity of such an ordinance would be to make the immense commerce which floats the Mississippi River the easy prey of all the towns and cities upon its banks. This commerce, carried on by these agencies, constitutes the very life-blood of Vicksburg and other towns and cities on the banks of this river. Public policy requires that this commerce shall be aided and facilitated, not taxed and obstructed. But the unconstitutionality of this ordinance is not maintained by reason alone, but by the supreme judicial authority also. Every decision made by the Supreme Court of the United States touching the subject, from its organization to the present time, condemns every such law or ordinance. Cannon v. New Orleans, 20 Wall. 577. That this demand was made and enforced, in pursuance to the ordinance, is apparent from the fact that no other law or ordinance, or city regulation, authorized or required it. Defendant has not exhibited or pretended to have had any other law or authority. It is moreover evident from the fact that the collections were made by the officer designated and appointed for the collection of that tax, and from the fact that the receipts given by him for the payment of the tax had printed upon them a copy of the ordinance, and, to make it the more conspicuous, it was printed with red ink. This must have been done, that those to whom they were presented might see the penalties denounced for non-compliance, and to avoid which, it was well expected, payments would be made without resistance. I must hold, therefore, that this defense is not maintainable."

As to the right to recover fees, voluntarily paid under the void ordinance, a question which was raised, but not expressly decided, in Northwestern Union Packet Co. v. City of St. Louis, *ante*, the court decided in the affirmative, using the following language: "The rule, undoubtedly, is that when a party, with a full knowledge of the facts, makes a voluntary payment to another, he can not recover it. The difficulty is in determining what is a voluntary payment. The learned counsel for the defense have read and commented on a large number of adjudicated cases, to show that payments made, as they assumed, under similar circumstances with those under consideration, were held to be voluntary. A careful consideration of these cases has satisfied me that no court has gone so far as to hold a payment, such as these were, to have been voluntarily made. The great current of authority as well as sound reason is against the defendant. A review of the cases is unnecessary. All of those which would seem otherwise to support the argument of counsel are cases where the parties stood upon an equality with each other, and it was simply a question with the payer, whether he would pay or litigate. Nothing but costs and expenses were to be hazarded by resistance in those cases. The provisions of the ordinance under consideration, together with the relation the parties bear to it, place them on very unequal grounds. In the first place, the ordinance is highly penal against all parties who do not yield an unquestioning obedience to its requirements. To instance, it imposes a fine of fifty dollars against the 'captain or officer in command of any steamboat who shall refuse to comply.' The city's own officer is to be the judge who tries the offender; for the ordinance provides, 'on conviction thereof before the mayor of said city,' the officer shall pay, etc. There is also a provision intended to place the *owners* of the boat also at a disadvantage. It provides, 'and said boat shall be charged at the

rate of $100 for each landing thereafter until the settlement of the litigated claim.' The mayor is authorized to enforce all fines by imprisonment. It would be difficult to frame an ordinance which would place the parties on a greater inequality. The payments, therefore, were exacted by compulsion. It is strangely contended by the defendant that plaintiffs are estopped, because the payments were made by them from week to week, and sometimes from day to day, during the six years. If a person should suffer personal injury by the hand of an assailant every day for a week or a month, the argument would not be seriously presented, that he was estopped from recovering damages for the wrongs on account of their daily repetition. But, we are not left without the highest authority on this question. In Cannon v. New Orleans, above referred to, the suit was brought to enjoin the further collection of the wharfage-charges, and to recover those paid for several years previously. Whilst it is true, nothing is said in the opinion of the court upon that portion of the suit for wharfages theretofore paid, we must presume the right was conceded, or the court, in its opinion, would have so declared. In Tuttle v. Everett, 51 Miss. 27, it was held that, when a corporation levies an illegal tax, and the tax-payer pays it to one who has a formal authority to collect it, such payment is not voluntary, but compulsive, and may be collected from the tax collector, unless he has paid it over to his superiors, in which event suit must be brought against the corporation. This was a tax collected under an Act of the Legislature afterwards declared by the Supreme Court to be void. In the case of the County of LaSalle v. Simmons, 5 Gilman, 513, the Supreme Court of Illinois held that, where payment of money is compelled by undue advantage of the situation of the party paying, and it is against equity and good conscience that the payment should be retained, the money so paid can be recovered by the party paying it. In the case of the City of Marshall v. Snedeker *et al.*, 25 Tex. 460, the Supreme Court of Texas held that, where the ordinances of municipal corporations require a party to obtain a license before retailing spiritous liquors, and impose a heavy penalty for their violation, a compliance therewith by the payment of the sum required to obtain the license, will not preclude a suit to recover it back. And, the parties not standing upon an equal footing, the rule that a party voluntarily paying money, with a knowledge of the facts, can not recover it back, does not apply. Without further comment, I am satisfied that the facts, found by the special verdict of the jury, establish the existence of all the facts, which Judge Dillon in his work on Municipal Corporations, page 705, holds necessary to enable one who has paid taxes to recover them back; that is, that the tax or charge imposed was wholly void and without authority; that the money, or its equivalent, was actually paid to the defendant for his own use, and that it was not voluntarily paid. Had the city made improvements, affording facilities to plaintiffs' boats to land, discharge and receive freight and passengers, of which they availed themselves, either at an agreed or reasonable rate, neither the Constitution nor public policy would have been invaded, and the money paid could not have been recovered back; but the verdict does not show such a state of facts."

BOOK NOTICES.

A SUMMARY OF EQUITY PLEADING. By C. C. LANGDELL, Dane Professor of Law in Harvard University. Cambridge: Charles W. Sever. 1877.

This work is radical and elementary. These terms are used in their literal sense. The author, in giving this summary of the principles of equity pleading has not been content to lay down the principles simply, or even with superficial comments; but with what care might be rightfully expected of one having the delicate and onerous charge of shaping the minds of future advocates and jurists, with the same this work has evidently been prepared.

The introduction is devoted to a concise, but nevertheless quite minute description of the course of a suit before the ecclesiastical courts of England; the object being to present a distinct outline of such proceedings, that the subsequent portions of the work, showing the body of equity procedure to be drawn from such practice, may be apprehended, and that as many as possible of the rules of equity pleading may be traced to their source.

The body of the work is devoted to a consideration of the equity system as it existed in England from the earliest times to the end of Lord Eldon's chancellorship, without any attempt to notice the modifications in England, or the different jurisdictions in this country; the object being "to aid the student in acquiring a knowledge of the equity system *as such*."

The text of the author's discussion is a collection of cases upon the law of Discovery, than which, for the subject in hand, no more comprehensive head of equity jurisdiction could have been selected; for, says an eminent predecessor of the present Dane Professor, "every bill in equity may, in truth, be properly deemed a bill of discovery; for it seeks a disclosure of circumstances relative to the plaintiff's case." 1 Story Eq. Jur., § 689. It is true that in many, if not quite all jurisdictions, the old bill of discovery, with its attendant expense and complexity, has been supplanted by a cheap and easy method of interrogating an adverse party, as an incident to the cause in which discovery is sought; but this fact is not argument for the abandonment of the study of the original system; for the principles of this head of jurisdiction are as vital and operative under a code as when the original bill was the appropriate remedy. Wilson v. Webber, 2 Gray, 558.

The author has presented, in their appropriate sequence, sketches of the bill, answer, replication and subsequent pleadings, demurrers and pleas, and has devoted chapters respectively to cross-bills, bills of discovery, purchase for value without notice, discovery and relief, and production of documents.

Perhaps one of the most entertaining portions of the book is the discussion of pleas, negative, affirmative and anomalous, and the marvelous absurdities in pleading, growing out of the decision of Sir John Leach, in Thring v. Edgar, 2 Sim. & St. 224, relative to the amount of discovery which must, and which must *not*, be given in the answer supporting a negative plea; when the distracted pleader found himself in a dilemma not more inviting, and was harrowed by an injunction not more rational, than was imposed upon poor Shylock by the Venetian tribunal, albeit Shylock was to take, while the pleader gave.

> "—— If thou tak'st more,
> Or less, than a just pound,—be it but so much
> As makes it light, or heavy, in the substance,
> Or the division of the twentieth part
> Of one poor scruple; nay, if the scale do turn
> But in the estimation of a hair,—
> Thou diest."

This decision ranking as a precedent, caused infinite confusion in subsequent pleadings, and was first successfully attacked, and its fallacies exposed by Vice-Chancellor Wigram, in his valuable, and now rare work, on Discovery.

In conclusion, we have to say, that this work must be a valuable addition to the handful of books which every law student is supposed to possess; for its evident design is to dispel obscurities, and leave little as possible to the mind of the student which is *anomalous*.

In the brief preface it is remarked that there is published, as a companion to this summary, the selection of cases which are the basis of the author's discussion. These cases, we are further informed, have for three or four years past been the text for instruction in equity pleading in the Law Department of the University at Cambridge. Excellent as is this material, we can easily understand that, without such light as this summary affords, the study of these select cases *as the only text*, might leave the mind of the former student in so frightful a maze, that it would be quite possible for him to quit the shades of Dane Hall with no very de-

fined ideas upon this important subject. Indeed we think, we are not alone in this opinion, and are disposed to regard this work as a concession to that sentiment.

The book is an ordinary octavo, and contains one hundred and thirty pages of matter, including an index and table of cases cited. It is in flexible covers, with beautiful, clean paper and printed in brevier.

E. G. M.

HOLMES' REPORTS. VOL. I. Reports of Cases determined in the Circuit Court of the United States for the First Circuit. JABEZ S. HOLMES, Reporter. Volume I. Boston: Little, Brown & Co. 1877.

This volume contains the cases determined in the Circuit Court of the First Federal Circuit, from July, 1870, to June, 1875, inclusive. Of this circuit Hon. George F. Shepley is the circuit judge, and Hon. Edward Fox, Hon. Daniel Clarke, Hon. John Lowell, and Hon. John P. Knowles, the district judges. Nearly all the opinions here reported are those of Judge Shepley; the opinions of the associate justice of the Supreme Court assigned to this circuit, Hon. Nathan Clifford, not being included. The cases are well reported, the index well made, and the syllabi generally thorough. The reporter, however, has omitted to head them with catch-words, indicating the subjects decided, and his work is here, we think, open to criticism. Fully two-thirds of the decisions are patent and maritime cases. The typographical execution of the work, it is hardly necessary to say, is excellent; in size it is somewhat smaller than the ordinary volumes of law reports. Among the decisions of general interest are the following:

COPYRIGHT—TITLE NOT WITHIN THE PROTECTION OF THE ACT—TRADE MARKS.—*Osgood v. Allen*, p. 185. Opinion by SHEPLEY, J. This was a bill in equity for an injunction to restrain the defendant from the use of the words, "Our Young Folks," as the title of a publication. The complainants were the proprietors and publishers of an illustrated magazine for boys and girls, entitled "Our Young Folks," which had been published monthly in Boston, under the same title since December, 1864. Previous to the publication of the first number, the publishers duly entered the title of their magazine, for securing the copyright thereof. They alleged that when the copyright of the first number was taken out, the title, "Our Young Folks," had not been adopted, and was not in use for any other similar publication; that they had expended large sums of money in publishing and selling the same, and that the work had acquired a large and valuable reputation throughout the United States and elsewhere as a publication for young people, under the title of "Our Young Folks." The defendant, a publisher at Augusta, Me., was publishing, commencing October 1, 1871, an illustrated publication for young people, under the title of "Our Young Folks' Illustrated Paper." The complainants claimed that they were entitled to a remedy under the law of copyright, and also that they had a right to the exclusive use of the name, "Our Young Folks," as indicating a periodical according to the doctrine of trade-marks, as applied to the protection of literary publications. The court held that the title of a copyrighted publication, separate from the publication which it is used to designate, is not within the protection of the copyright; that the office of a trade-mark is to point distinctively to the origin or ownership of the article to which it is affixed; that where a trade-mark right is invaded, the essence of the wrong consists in the sale of the goods of the manufacturer or vendor as those of another; that it is only where this false representation is directly or indirectly made, that relief is granted in equity; and as it did not appear whether or not the public was actually deceived, or in danger of being deceived, into buying the defendant's publication as that of the complainant, the cause was referred to a master to ascertain and report whether such was the fact. By the plain terms of the act, said the court, the copyright protested is the copyright in "the book," the word "book" being used to describe any literary composition. Although a printed copy of the title of such book is required, before the publication, to be sent to the librarian of Congress, yet this is only as a designation of the book to be copyrighted; and the right is not perfected, under the statute, until the required copies of such copyright-book are, after publication, also sent. It is only as a part of the book, and as the title to that particular literary composition, that the title is embraced within the provisions of the act. It may possibly be necessary in some cases, in order to protect the copyrighted literary composition, for courts to secure the title from piracy, as well as the other productions of the mind of the author in the book. The right secured by the act, however, is the property in the literary composition—the product of the mind and genius of the author, and not in the name or title given to it. The title does not necessarily involve any literary composition; it may not be, and certainly the statute does not require that it should be, the product of the author's mind. It is not necessary that it should be novel or original. It is a mere appendage, which only identifies, and frequently does not in any way describe, the literary composition itself, or represent its character. By publishing, in accordance with the requirements of the copyright-law, a book under the title of the life of any distinguished statesman, jurist or author, the publisher could not prevent any other author from publishing an entirely different and original biography, under the same title. When the title itself is original, and the product of the author's own mind, and is appropriated by the infringement, as well as the whole, or a part of, the literary composition itself, in protecting the other portions of the literary composition, courts would probably also protect the title. But no case can be found, either in England or in this country, in which, under the law of copyright, courts have protected the title alone, separate from the book which it is used to designate. In Jolie v. Jaques, 1 Blatch. 627, Mr. Justice Nelson says: "The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it as certainly as the principal carries with it the incident." The only doubt expressed by Mr. Justice Nelson in that case is as to how the question might be decided in case of a valid copyright of a book and an infringement of the title by the defendant. While expressing no opinion upon this question, the reasoning by which he arrives at the conclusion, that, when the book fails to be protected, the title goes with it, would seem clearly to point to a similar result in a case of alleged infringement of copyright of the book; namely, that if there was no piracy of the copyrighted book, there could be no remedy under the act for the use of a title which could not be copyrighted independently of the book. The injunction granted in the case of Hogg v. Kirby, 8 Ves. 215, was not founded on copyright, but on the power of a court of equity to restrain one person from carrying on a trade, or from publishing a work, under a fraudulent representation that such trade or work is that of another. In the case at bar relief is sought, not only under the law of copyright, but upon the general ground of equity, as relates to the good will of trades, and the doctrine of trade-marks. It becomes necessary for the court to determine, in this case, how far the complainants are entitled to a remedy upon these grounds of equity jurisdiction, and upon the general principles governing courts of equity jurisdiction. Property in the use of a trade-mark or name has very little analogy to that which exists in copyrights or patents for inventions. In all cases where rights to the exclusive use of a trade-mark are invaded, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another. It is only when this false representation is directly or indirectly made, that relief is granted. Canal Co. v. Clark, 13 Wall. 311. Words or devices may be adopted as trade-marks, which are not original inventions of the one who adopts and uses them. Words in common use may be adopted, if, at the time of the adoption, they were not used to designate the same or similar articles of production. A generic name, or a name merely descriptive of an article of trade, or its qualities or ingredients, can not be adopted as a trade-mark, so as to give a right to the exclusive use of it. The office of a trade-mark is to point distinctively to the origin or ownership of the article to which it is affixed. Marks which only indicate the names or qualities of products can not become the subjects of exclusive use; for, from the nature of the case, any other producer may employ, with equal truth and the same right, the same marks for like products. Geographical names, which point out only the place of production, and not the producer, can not be appropriated exclusively, so as to prevent others from using them and selling articles produced in the dis-

tricts they describe under these appellations. In the case of Brooklyn White Lead Co. v. Masury, 25 Barb. 413, the court said that, as both plaintiff and defendant dealt in the same article, and both manufactured it at Brooklyn, each had the same right to describe it as "Brooklyn White Lead." The Master of the Rolls well expresses the whole law of trade-marks by names in the case of the Collins Co. v. Cowen, 3 Kay & Johns. 428. He says: "There is no such thing as property in a trade-mark as *an abstract name*. It is the right which a person has to use a certain name for articles which he has manufactured, so that he may prevent another person from using it, because the mark or name denotes that the articles so marked were manufactured *by a certain person*, and no one else can have the right to put the same name upon his goods, and then represent them to have been manufactured by the person whose mark it is." Applying these principles to the case before this court, the question presented is, whether the defendant has so simulated the mark of the complainant as to deceive the public, so that it will naturally mistake his publication for that of the complainant.

CERTIFICATES OF STOCK — TRANSFER — AUTHORITY OF CASHIER TO BIND BANK—ESTOPPEL.—*Matthews v. Massachusetts Nat. Bank*, p. 397. Opinion by SHEPLEY, J. A stock certificate, originally for two shares of stock, in the name of C, which had been by him fraudulently altered so as to purport to be for two hundred shares in the name of a certain bank as collateral, was received in good faith by the bank from C, as collateral security for a loan to him. On payment of the loan by C, the cashier of the bank, as such, signed a transfer in blank upon the back of the certificate, and delivered it to C. Afterwards the plaintiff, in good faith, received the same certificate from C, as collateral security for a loan then made to him. The plaintiff's loan was not paid. On suit by him against the bank, to recover the amount of his loss, *held* that the bank was liable. 1. It is within the general authority of the cashier of a bank to sign, in its behalf, a blank transfer upon a certificate of stock in the name of the bank, held by it as collateral security for a loan, and deliver the certificate to the pledgor on payment of the loan. 2. The signing a transfer in blank on a certificate of stock is a warranty of the genuineness of the certificate.—1. Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business conducted by the bank. Their acts within the scope of such usage, practice, and course of business, will in general bind the bank in favor of third persons possessing no other knowledge. Morse v. Mass. Nat. Bk., *ante* p. 209; Minor v. Mechanics' Bk., 1 Pet. 70; Merchants' Bk. v. State Bk., 10 Wall. 604. One of the ordinary and well known duties of the cashier of a bank is the surrender of notes and securities upon payment; and his signature to the necessary transfers of securities or collaterals, when in the form of bills of exchange, choses in action, stock certificates, or similar securities for loans, which are personal property, is an act within the scope of the general usage, practice, and course of business in which cashiers of banks are held out to the public as having authority to act. Undoubtedly the ordinary duties of a cashier do not comprehend the making of a contract which involves the payment of money without an express authority from the directors, unless it be such as relates to the usual and customary transactions of the bank. But the transfer of certificates of stock held as collateral is certainly one of the usual and customary transactions of banks, and the public would be no more likely to require evidence of a special authority to the cashier to make such a transfer, than of a special authority to draw checks on other banks, or to perform any other of the daily duties of his office. The signature of the cashier must therefore be considered as the signatnre of the bank. 2. The next question is, whether such blank assignment on the back of the certificate, by the bank, is so far a warranty of the genuineness of the certificate, that the bank is estopped from setting up the forgery as a defense. In the case of forged negotiable instruments, it is well settled that the indorser warrants that the instrument itself, and the antecedent signatures thereon, are genuine. Story on Prom. Notes, p. 135; State Bk. v. Fearing, 16 Pick. 533; Hortsman v. Henshaw, 11 How. 183; Critchlow v. Parry, 2 Camp. 182; Canal Bank v. Bank of Albany, 1 Hill, 287. The indorser's liability in these cases is properly placed upon the ground of estoppel. "This proceeds," says Judge Story, "upon the intelligible ground that every indorser undertakes that he possesses a clear title to the note deduced from and through all the antecedent indorsers, and that he means to clothe the holder under him with all the rights which by law attach to a regular and genuine indorsement against himself and all the antecedent indorsers. It is in this confidence that the holder takes the note without further explanation; and if each party be equally innocent and one must suffer, it should be the one who has misled the confidence of the other, and by his acts held out to the holder that all the indorsements are genuine, and may be relied on as an indemnity in case of the dishonor thereof." This is a statement of the grounds upon which the rule of law rests as applicable to negotiable instruments; but the reasoning would seem to apply with equal force and pertinency to the case of a transfer of a certificate of stock by indorsement in blank. Stock certificates are sold in open market like other securities, and form the basis of commercial transactions. In the language of Davis, J., in Bank v. Lanier, 11 Wall. 377, "although neither in form nor in character negotiable paper, they approximate to it as nearly as practicable." In Leitch v. Wells, 48 N. Y. 613, it is said: "Since the decision of the case of McNeil v. Tenth National Bank, 46 N. Y. 325, certificates of stock, with blank assignments and powers of attorney attached, must be nearly as negotiable as commercial paper." The common practice of passing the title to stock by delivery of the certificate, with the blank assignment and power, has been repeatedly proved and sanctioned in cases which have come before the courts in New York. In N. Y. & N. H. R. v. Schuyler, 34 N. Y. 41, the rights of parties claiming under such instruments were fully recognized by the court, and such mode of transfer was shown to be the common practice in the city of New York. It is well settled that the form of assignment printed on the back of stock certificates, when signed in blank, may be filled up by a subsequent purchaser of the stock. Kortright v. Com. Bk. of Buffalo, 20 Wend. 348; Bridgeport Bank v. N. Y. & H. R. Co., 30 Conn. 273. The certificate in this case, as it came from the bank, contained, on the same piece of paper and on the back of the certificate, a blank assignment, which was all that was necessary to transfer the title of the stock as between the parties. The defendant must, therefore, be held to have intended and agreed, that whoever should present the certificate so issued from the bank, with the assignment executed in blank, should be entitled to fill up the blanks with his own name, and to have a transfer of the stock made to himself on the books of the company. The certificate, accompanied with the transfer executed in blank, has a species of negotiability of a peculiar character, but one well recognized in commercial transactions and judicial decisions, and absolutely essential in the usage and necessities of modern commerce to make such certificates available in commercial transactions. Even when such blank assignments or powers of attorney to transfer stock are under seal, the blanks may be filled up according to the agreement of the parties at the time. Bridgeport R. R. v. N. Y. & N. W. R. R., 30 Conn. 274. The decisions to the contrary in the English courts have not been followed in this country, and they were influenced not merely by a rigid adherence to the technical rules of the common law in relation to instruments under seal, but by the policy of the stamp system. But the case of Walker v. Bartlett, 36 Eng. L. & Eq. 368, and later English decisions recognize the validity of blank transfers of stock, and that such transfers impose upon the holder of them the obligation to pay calls upon the shares while they remain his property. In Kortright v. Buffalo Com. Bk., 20 Wend. 94, speaking of the filling up of a blank transfer of stock, and power of attorney, Nelson, C. J., after stating this is in strict conformity with the universal usage of dealers in the negotiation and transfer of stocks, according to the proof in the case, goes on to say: "Even without the aid of this usage, there could be no difficulty in upholding the assignment. The execution in blank must have been for the express purpose of enabling the holder, whoever he might be, to fill it up. If intended to have been filled up in the name of the first transferee, there would have been no necessity for its execution in blank; Barker might have completed the instrument." The right to fill the blank in a blank transfer of stock is recognized by the supreme court of Massachusetts in Sewall v. Boston Water Power Co., 4 Allen, 277. If the conditions which governed the apparent right of control which the bank conferred upon C, were not expressed on the face of the instrument, but remained in confidence between the bank and C, the case is not distinguishable in principle from that of an agent

who receives secret instructions qualifying or restricting an apparently absolute power. Jarvis v. Rogers, 15 Mass. 389; Pickering v. Burk, 15 East, 38: Fatman v. Loback, 1 Duer, 354; N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 31. One or more innocent parties must suffer by the fraud of C. Under similar circumstances courts have repeatedly held that the party must suffer who has exhibited the greatest degree of negligence. The leading case on the indorsement of bills of lading, Lickbarrow v. Mason, 2 T. R. 63, is an authority on this point. See also Lobdell v. Baker, 3 Met. 469; Polhill v. Walter, 3 B. & Ad. 114. The bank is precluded from setting up the fact of the forgery of the instrument, because it would be a wrong on its own part, and an injury to others whose conduct had been influenced by the acts and omissions of the bank. Swayne, J., in Merchants' Bank v. State Bank, 10 Wall. 645, says: "Estoppel *in pais* presupposes an error or a fault, and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another." Clifford, J., recognizes this principle in his dissenting opinion in that case: "If a bank may be held liable in any case upon a certificate of their cashier that a check is good, when they have no funds of the drawer, it is not because the cashier is authorized to make such certificate, but because the bank is bound by his representation, notwithstanding it is false and unauthorized." An estoppel is a salutary rule which prevents a man from proving that to be false, which he has once represented to be true, when others have acted on the faith of his representation.

NOTES OF RECENT DECISIONS.

TEACHER AND PUPIL—POWER TO INFLICT CHASTISEMENT—ASSAULT AND BATTERY—WAIVER BY PUPIL.—*State v. Mizner*, Supreme Court of Iowa, 2 West. Jurist, 91. Opinion by DAY, J. 1. Where, upon an information charging a teacher with assault and battery, the prosecuting witness testified that on entering the school, about the 10th day of November, 1874, she told the defendant she was twenty years of age, and that in fact she was twenty-one on the 25th day of that month, and that on the 22d day of December, 1874, while she was a pupil in defendant's school, the defendant whipped her in a manner which, from the testimony, appeared to be unreasonable and immoderate: *Held*, that the court erred in refusing to allow the defendant to show that such whipping was reasonable chastisement of the prosecuting witness for misconduct as a pupil. 2. Where, in such case, the court instructed the jury that, "if you find from the evidence that the defendant committed an assault and battery upon the prosecutrix, and you further find from the evidence that at the time of the assault the prosecutrix had attained the age of twenty-one years, you are instructed that the defendant had not the lawful right to make the assault and battery as a punishment for disobedience of the orders of the teacher, or of the rules of the school": *Held*, that such instruction was erroneous. 3. There can be no doubt of the correctness of the general doctrine, that a teacher may, for the maintenance of his authority and the enforcement of discipline, legally inflict reasonable chastisement upon a pupil. Nor in such case would a teacher be liable to prosecution for assault and battery, for inflicting reasonable and moderate chastisement upon a pupil a few months older than twenty-one years, or a few months younger than five years, for conduct tending to destroy the order of the school, and lessen the means of imparting instruction to others, when such pupil is admitted into the school upon misrepresentation as to age, or by mere sufferance. 4. A person over twenty-one years of age becomes a pupil only by his own voluntary act. If he does so, and of his own free will creates the relation of teacher and pupil, he thereby waives any privileges which his age confers. These views were sustained by the case of Stevens v. Fassett, 27 Me. 266, where the court say: "But it is insisted that, if such is the authority of the teacher over one who is in legal contemplation a scholar, the same can not apply to the case of one who has no right to attend the school as a pupil. It is not necessary to settle the question, whether one living in the district, and not being between the ages of four and twenty-one years, can with propriety require the instruction of town schools. If such does present himself as a pupil, is received and instructed by the master, he can not claim the privilege and receive it, and at the same time be subject to none of the duties incident to a scholar. If disobedient, he is not exempt from the liability to punishment, so long as he is treated as having the character which he assumes. He can plead his own voluntary act, and insist that it is illegal, as an excuse for creating disturbances, and escape consequences which would attach to him either as a refractory, incorrigible scholar, or as one who persists in interrupting the ordinary business of the school."

NEGOTIABILITY OF NOTE ISSUED BY BUILDING ASSOCIATION—LIABILITY OF INDORSERS—REQUISITES OF SEAL.—*Jackson v. Meyers*. Court of Appeals of Maryland, 4 Am. L. T. Rep. 13. Opinion by ALVEY, J. A building association was organized in August, 1871, under the act of 1868, ch. 471, the general incorporation law of the state, and by the 9th and 11th articles of its association, it was provided that its board might issue promissory notes on mortgages only, and that such notes should always be drawn to the order of the mortgagor, who should in all cases indorse the note thus drawn. The president, secretary, treasurer and three directors were authorized to sign all promissory notes issued by the association. Under the authority of these articles the association issued its note to the appellees instead of money, for which a mortgage was given. The note was strictly in form a promissory note, payable to the order of the appellees. It was drawn at sixty days' time, and payable at a certain named bank; and was signed by the officers designated in the articles of association to execute promissory notes. In one corner of the face of the note there was the type or emblem of what was alleged to be the seal of the corporation; this alleged seal consisted simply of an emblem or symbol printed by the printer at the time when the printed blank note was struck. The note was indorsed by the payees, and by them negotiated, and at maturity was duly presented for payment, and was dishonored and protested, and notice given by the notary to the said indorsers, and payment duly demanded of them. Suit was brought on the note by the indorsees against the indorsers, who contended that they were not liable by reason of their indorsement, because the instrument sued on was a single bill. *Held:* 1. That the note sued on was a negotiable promissory note, and by the indorsement thereof in the ordinary way, the indorsers became liable. 2. That the nature of the transaction itself, the objects and purposes to be subserved by the issue of the note, as well as its form, indicated that the parties must have understood that the note was negotiable, and that it would be so accepted and dealt with by the commercial community. 3. That the symbol or printed representation of the seal, if it be conceded to be a sufficient seal, was not printed on the note to restrain its negotiability, or to change it into a specialty, but rather as a mark of genuineness. The authorities mainly relied on by the appellees in support of the position that, because there was a seal, or the representation of a seal, on the note, therefore the note must be a specialty, were the cases of Trasher v. Everhart, 3 Gill & John. 234; Stabler v. Cowman, 7 Gill & John. 284, and Gist v. Drakeley, 2 Gill, 330 The first two of these cases presented no

question as to what constituted, or as to the effect of printing a representation of a corporate seal on an instrument executed by a corporation; but were cases where the instruments involved were executed by individuals, using the scrawl at the end of their names as seals. The law settled by those cases we in no manner design to disturb. The latter case, however, is quite distinguishable from the present. There, the two notes executed by the corporation, though in the ordinary form of promissory notes, bore upon their face such evidence of design as to leave no doubt of their real character. They bore the regular impress of the seal, attested by the signature of the president; the notes concluded with the words: "Witness the seal of the company, attested by the signature of the president." The seal was the only real evidence of execution, the signature of the president being added to attest the affixing of the seal to the instruments. Not so in the execution of the note here. The note in no manner depended upon the seal for its validity, but derived its entire authenticity from the signatures of the officers authorized to execute it. This view of the subject is fully sustained by the recent cases of Dinsmore v. Duncan, 57 N. Y. 573, and Vermilye v. Adams Express Co. 21 Wall. 138, involving the consideration of the nature and qualities of the United States treasury notes, issued under the seal of the treasury, as authorized by the Act of Congress of March 3, 1865.

NOTES OF RECENT ENGLISH DECISIONS.

MARRIED WOMAN — WILL — SEPARATE ESTATE.—*Bishop v. Wall.* High Court of Justice, 25 W. R. 93. By marriage settlement, personalty of the wife was settled upon trust for her for life for her separate use, and after her death if her husband should survive her to pay him so much of the income as she should appoint, and subject thereto for the children of the marriage; in default of children, and if the wife should survive her husband, for the wife, her executors, administrators, and assigns, for her separate use; if she should not survive him, for such of the descendants of her parents as she should, notwithstanding coverture, by deed or will appoint. There were no children of the marriage, and the wife survived her husband. *Held*, that the limitations in the settlement gave the wife, in the events which happened, the whole of the property for her separate use, and that accordingly it passed under a will executed by her during the coverture and not republished after her husband's death.

INJUNCTION—ULTRA VIRES—COMPANY BUYING UP ITS OWN SHARES—CLAUSE OF FORFEITURE OF SHARES IN EVENT OF SHAREHOLDER PROCEEDING AGAINST THE COMPANY.—*Hope v. The International Financial Society.* High Court of Justice, 25 W. R. 67. 1. A large proportion of the shareholders in a company being dissatisfied and anxious to withdraw, the directors recommended that part of the company's assets should be applied in buying their shares; and at a general meeting of the company it was resolved that this recommendation should be carried into effect. The company's articles contained no power to buy up its own shares. *Held*, that the scheme was *ultra vires*, being for the reduction of the capital of the company, and the directors were restrained by injunction at the instance of a shareholder from carrying it into execution. 2. One of the clauses in the articles of association provided that, in the event of a shareholder commencing any legal proceedings against the company or the directors, the company might forfeit his shares on paying him the market price for the same. *Held*, that such clause was inoperative as against a shareholder, who sought to restrain the directors from doing an illegal act.

WAGERING CONTRACT—WINNER OF LAWFUL SPORT OR PASTIME—DEPOSIT OF MONEY TO DEPEND ON HORSE TROTTING AGAINST TIME.—*Batson v. Newman*, Court of Appeals, 25 W. B. 85. The plaintiff and H deposited £50 each with the defendant, and agreed that the whole sum of £100 should be paid by the defendant to H, if H's horse trotted eighteen miles in an hour; and if not, then to the plaintiff. The horse trotted the distance within the time and the defendant paid over the money to H. But before the payment the plaintiff had demanded the money back. *Held* (affirming the decision of the Common Pleas Division), that the transaction was a simple wager, and was not protected by the proviso in 8 & 9 Vict. c. 109, s. 18, as a contribution towards a sum of money to be awarded to the winner of a lawful game, sport, pastime, or exercise; and that consequently the agreement was void, and the plaintiff was entitled to demand his money back from the defendant. For the defendant it was contended that the case came within the proviso of the section of the statute above set out; for the stakes were contributions to a "sum of money to be awarded to the winner of a lawful sport, pastime, or exercise." This was a lawful pastime, and it was immaterial that only two persons contributed: Batty v. Marriott, 5 C. B. 818; Varney v. Hickman, 5 C. B. 271; Aubert v. Walsh, 3 Taunt. 277; Evans v. Pratt, 3 M. & G. 759; and Brown v. Overbury, 4 W. R. 252, 11 Ex. 715. JAMES, L. J., said that the transaction was a plain, simple bet and nothing else. There was no contribution to a prize or sum of money to be awarded to a winner, and the proviso in the 8 & 9 Vict., c. 109, s. 18, had no application whatever—MELLISH, L. J.: I am of the same opinion. In Batty v. Marriott, where two persons contributed a sum of money to be awarded to such one of them as was the winner in a footrace, it was held the case came within the proviso. We are asked to go further, and say that the proviso applies, although only one person is to do anything. In my opinion all the persons capable of winning must be persons engaged in the sport or pastime, and the winner must be the winner of that. But here, if the horse does not succeed, the money is to be awarded to a person who is the winner of nothing but a sum of money. That is a simple wager.

ACTION FOR MONEY HAD AND RECEIVED—FAILURE OF CONSIDERATION—FRAUD—SALE OF PRETENDED PATENT RIGHT—KNOWLEDGE ON PART OF PURCHASER—PAYMENT FOR FRAUDULENT PURPOSES.—*Begbie v. Phosphate Sewage Co.* Court of Appeals, 25 W. R. 85. The defendants, an English limited company, being possessed of a patent (taken out and valid in England, but not valid in Berlin) for the process of utilizing sewage, agreed to sell to the plaintiff for £15,000 the sole and exclusive right to use and exercise the patent process in Berlin. The plaintiff was really acting on behalf of H, a large shareholder and director in the English company, and his object was to form a company for using the process in Berlin, and to induce persons to take shares in the Berlin company, under the belief that that company, having bought the right sold to the plaintiff by the defendants, would be entitled to the exclusive use of the process in Berlin. The scheme was carried out in the following manner: The plaintiff conveyed his interest to L for £30,000. L then conveyed his interest so acquired for $30,000 to M, a clerk in H's office, as trustee for the intended company at Berlin. The £30,000 was in fact paid to H and not to the plaintiff. The plaintiff and H and L all knew, but the English company did not know, that by the law existing at Berlin no exclusive right to use the

process there could be obtained. The plaintiff brought an action to recover the £15,000 from the defendants, on the grounnd that, as there was no exclusive right to use the process in Berlin, the consideration had failed. *Held*, that no action could be maintained (1) because the plaintiff had in fact obtained that for which he had paid the £15,000, namely, an ostensible grant of the exclusive right, in order to float the Berlin company; and (2) because the plaintiff had paid the money for the purpose of defrauding the shareholders of the intended company at Berlin. Decision of the Court of Queen's Bench (reported 24 W. R. 115, L. R. 10 Q. B. 491) affirmed.

ABSTRACT OF DECISIONS OF ST. LOUIS COURT OF APPEALS.

October Term, 1876.

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

PRACTICE AND PLEADING — DEMURRER — WHEN THE COUNTY NECESSARY PARTY.—When lands, mortgaged to secure the loan of school funds of a township, are sold, they may be bid in by the county for the use of the township. Acts 1874, § 62, p. 161. In an action of ejectment brought in the name of the county to use of the township, to recover possession of lands so purchased, it was error to sustain a demurrer to the petition upon the ground of a misjoinder of parties, and for the further reason that the county had no power given by statute to sue, or to take and hold lands. A county is a *quasi* corporation and may sue and be sued. [Citing Wag. Stat. p. 408, § 5.] Demurrer should have been overruled. Judgment reversed. Opinion by BAKEWELL, J.—*Lincoln County v. Magruder.*

LIABILITY OF MUNICIPAL CORPORATION FOR LOSSES FROM CHANGE OF GRADE OF STREETS—CONSTRUCTION OF CHARTER OF ST. LOUIS—REPEAL BY IMPLICATION.—Upon general principles, no liability attaches to a municipal corporation for losses resulting from a change of grade in the streets. But section 1, art. XII, of the charter of the City of St. Louis, makes the city liable to owners of real estate having permanent buildings thereon, for changes of grade by which such property is injured, and the city can not escape liability by reason of technical infirmity in the ordinance by which the new grade was declared, so long as the work was within the general scope of the corporate powers. [Citing Thayer v. Boston, 19 Pick. 511; City of Pekin v. Newell, 26 Ill. 320.] By Sec. 9, Art. VIII of the charter, when the mayor and council deem it necessary, the council shall, by ordinance, cause the grading of the streets, alleys, etc. The provision of sec. 3, art. III of the charter, that prior general ordinances shall not be repealed by subsequent special ordinances, by implication, does not prevent the repeal of special ordinances by implication. It is no defense to an action against the city for injuries to permanent buildings by change of grade, that the work of grading as prescribed by ordinance was never completed. Judgment affirmed. Opinion by LEWIS, C. J.—*Schumacker v. City of St. Louis.*

MUNICIPAL CORPORATION—RIGHT TO CONTROL STREETS—RAILROAD TRACKS ON STREETS—POWERS UNDER CHARTER OF R. R. CO. TO BUILD RAILROAD LINES—TITLE TO HIGHWAY—CHANGE OF TERMINUS—RES ADJUDICATA.—Where a railroad track is laid down or maintained on a street of the City of St. Louis, without authority, it is the right and duty of the city to remove it; and in order to have the city perpetually enjoined from removing such track and restoring such street to the uses of ordinary travel, it would be necessary for the owners of such track to show a clear right to maintain and operate the same. Highways being universally the property of the state are subject to its absolute control. [Citing Philadelphia and Trenton R. W. Co., 6 Mort. 44.] The use of a street by a railroad is not a perversion of the highway from its original purpose. [Citing Loter v. N. M. R. R., 34 Mo. 128.] In the absence of a preventive legislative enactment, municipal corporations may regulate the means of propelling cars in the corporate limits, and may prohibit the use of steam cars altogether, or regulate their speed. [Citing Dill. Munic. Corp. § 565; 5 Hill, 209.] The ordinary power to regulate streets will not empower the city to authorize the construction of street railways to be traversed by steam cars. [Citing Dill. Munic. Corp., §§ 578, 559.] In this state steam, as a means of locomotion over the streets of a city, is prohibited by acts 1855, p. 185, § 28, par 5, and by the Constitution of 1865, art. IV, sec. 27; Const. 1875, art. XII, sec. 20, except where the consent of the local authorities is first obtained. The location of a road "from" a city does not authorize the road to enter it, and where it is provided that the road may cross streets, etc., it means streets of such towns and cities as the road is authorized to pass through. [Citing N. E. R. R. Co. v. Payne, 8 Rich. 177.] The road, having selected its terminus in the city and maintained the location for twenty years, will not be permitted to change the same. [Citing Bukly v. Cent. R. R. Co. & Brooklyn City R. R. Co., 32 Barb. 358.] The right to build lateral can not be construed into a "roving commission, and is exhausted at the expiration of the time within which it is required by its charter to build its road." [Citing Att'y Gen'l v. West Wis. R. R. Co., 36 Wis. 466; M. & E. R. R. Co. v. Central Road, 31 N. J. 207.] The company that built the road could give to their grantee no greater rights than it had itself, and it had no right to maintain a railroad in the streets of the city which it constructed under a temporary license without the consent of the local authorities. The question is not *res adjudicata*, which has never proceeded to final judgment. Judgment reversed, and injunction dissolved. Opinion by BAKEWELL, J.—*A. & P, R. R. Co. v. City of St. Louis.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1876.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, } Associate Justices.
" WARWICK HOUGH, }
" E. H. NORTON, }
" JOHN W. HENRY, }

UNLAWFUL DETAINER—JUDGMENT FOR RENT.—In unlawful detainer a judgment for money due for rent, without a judgment for possession of the premises, is erroneous. The judgment should be for possession and for damages.—Opinion by HOUGH, J.—*Farwell v. Euston et al.*

TRESPASS—INTEREST ON DAMAGES.—In an action against a railroad company for damages caused by negligent escape of fire from a locomotive, it is error to allow interest on the damages awarded, (Kenry v. Han. & St. Joe R. R., decided May 15, 1876, not yet reported), and judgment will be reversed when the court gave an instruction directing the jury to allow interest on damages from the date of the injury. Opinion by HOUGH, J.—*Atkinson v. A. & P. R. R. Co.*

COLOR OF TITLE—STATUTE OF LIMITATIONS—ADVERSE POSSESSION.—Color of title may arise from possession under a verbal contract of sale, or under a deed which is void on its face. Where the sheriff conveyed to A by a deed which was void (not being under seal), and A conveyed to B who took possession and claimed the land as his own, either deed gave color of title. When the possession originates in a mere mistake as to the boundaries of the lands, in the absence of any fiduciary relation between the parties, the possession may be adverse to the real owner.—The plea of an adverse possession is not defeated by three years' actual absence from the land, when the absence is caused by military force, and the possession is re-asserted in a reasonable time after the cause of absence has ceased to operate. Opinion by NAPTON, J.—*Hamilton v. Bozzess.*

OBJECTION TO PETITION, FOR WANT OF PARTIES, MUST BE MADE IN COURT BELOW—CONSTRUCTION OF CONTRACT—PAROL EVIDENCE.—A & B conveyed to the wife of C land said in the deed to be a tract "containing in all, including said lots, thirty acres, more or less." A only brought suit, alleging that, at the time and prior to the delivery of the deed to C's wife, on a contract of sale made with C, it was agreed that the land should be conveyed to C.'s wife at $35 per acre; that, if there should be more than thirty acres, C was to pay for all in excess of that quantity

at the same rate, and if less than thirty acres, A & B were to refund at the same rate for the deficit, and that $1,050 was paid; that, on a survey of the land, there was found to be 34 74-100 acres, and that C paid to B his part of the excess ($135.45), and refused to pay A for his part, wherefore he brings suit. *Held*, The objection that B was not joined as a party plaintiff is not available in the supreme court, since the objection was apparent on the face of the petition, and not being demurred to, was thereby waived; and that, although B was a party to the contract, it was not necessary to make him a party to the suit, because the petition alleges that he had been fully paid off, and had no interest in the controversy. Nor is the petition demurrable on the ground that, the deed having been made to a married woman, the contract could not be enforced against her because the petition avers a contract with the husband, nor on the ground that the verbal agreement was within the statute of frauds. The contract was not for the sale of lands, but is a demand for money arising out of that contract. Wilkinson v. Scott, 17 Mass. 249; Bowen v. Bell, 20 Johns. 338. And, the plaintiff having performed the contract entirely, the defendant can not take refuge behind the statute. Suggett's Adms. v. Cason's Adms., 26 Mo. 221, and cases cited. It is not permissible to control or vary the operative words of a deed by parol so as to defeat the conveyance; but the exclusion extends no further, and it is no longer an open question in this state, whether parol evidence is admissible as to contemporaneous verbal agreements (executed by plaintiff). McCrea v. Purmort, 16 Wend. 460, and cases cited; Laudman v. Ingram, 49 Mo. 212; Dickson v. Anderson, 9 Mo. 156; Rabsuhl v. Lack, 35 Mo. 316; Fontaine v. Boatman's Sav. Inst., 57 Mo. 561; Hollocher v. Hollocher, 62 Mo. 267. Opinion by SHERWOOD, C. J.—*McConnell v. Brayner.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF NORTH CAROLINA.

January Term, 1877.

HON. RICHMOND M. PEARSON, Chief Justice.
" EDWIN G. READE,
" W. B. RODMAN,
" W. P. BYNUM,
" W. T. FAIRCLOTH, } Associate Justices.

CONSTITUTIONAL LAW — ACT ESTABLISHING SPECIAL COURT IN TOWNS AND CITIES—JURISDICTION OF SUPERIOR COURT.—The act of the General Assembly, (Laws of 1871-'72, chap. 195) establishing special courts in cities and towns, is constitutional. The superior courts have exclusive jurisdiction of misdemeanors, where the punishment is not limited to a fine exceeding fifty dollars, or imprisonment not exceeding one month. Municipal ordinances and by-laws must be in harmony with the general laws of the state, and whenever they come in conflict with such general laws, must give way. *Therefore*, where an act is a criminal offense indictable in the superior courts, an ordinance of a city or town, making such act a criminal offense punishable by fine and imprisonment, is void.—*Town of Washington v. Hammond.*

SUIT AGAINST ADMINISTRATOR FOR AN ACCOUNT—PROCEDURE PLEADING.—1. A special proceeding by a creditor against an administrator or executor for an account must be by summons and complaint in the first instance. Any other creditor coming in need not file a complaint, unless his claim is denied; but such claim must be verified, unless it is a judgment or some writing signed by the deceased. 2. When, in such proceedings, the plaintiff filed memoranda of the evidence of debt, but no complaint, and the defendant answered, and thereupon the plaintiff replied: *Held*, that the pleadings were irregular, and the court below committed no error in remanding the cause to the clerk in order that the plaintiff might file a complaint. —*Isler v. Murphy.*

STATUTE PRESCRIBING PENALTY AGAINST TOWN CONSTABLE FOR REFUSING TO QUALIFY, CONSTITUTIONAL—WHEN FACTS FOUND IN JUSTICE'S COURT CONCLUSIVE—PRACTICE.—The provisions of chapter 111, section 25, Battle's Revisal, prescribing a penalty of $25 against any person who is duly elected or appointed town constable and who refuses to qualify, etc., are not in conflict with art. 1, sec. 17, of the Constitution. The facts found on a trial in a justice's court, where the judgment is for $25, or less, are conclusive upon an appeal to the superior court. In such case the justice should not include in the record sent up a statement of the evidence, unless there were exceptions to its admission in his court. In an action in a justice's court for a penalty it is sufficient, if the warrant states the amount due and how claimed.—*London v. Headen.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1876.

HON. JAMES L. WORDEN, Chief Justice.
" HORACE P. BIDDLE,
" WILLIAM E. NIBLACK,
" SAMUEL E. PERKINS,
" GEORGE V. HOWK, } Associate Justices.

STATUTE OF FRAUDS.—In a suit on promissory notes, the defendant answered that the plaintiff agreed, in consideration that the defendant would forbear to issue execution on a judgment against A. B., that the plaintiff would pay the same, by crediting the amount thereof on the notes sued on. *Held*, that this was a promise to answer for the debt of another and was within the statute of frauds; that, no copy being set out, the promise must be presumed to have been by parol. Judgment affirmed. Opinion by WORDEN, C. J.—*Krutz v. Stewart.*

SET-OFF—WHEN IT MAY BE PLEADED.—Only such facts as constitute a cause of action on which a personal judgment could be recovered against the plaintiff can be pleaded as a set-off in an answer to a complaint. Where the answer alleged that the defendant held a vendor's lien on a lot which the plaintiff had purchased with notice of the lien; *held*, not a good set-off; because the plaintiff would have his election to pay off the lien or suffer it to be enforced against his property, but the defendant could only foreclose her lien and would not be entitled to a personal judgment against the plaintiff. Judgment reversed. Opinion by PERKINS, J.—*Brake v. King et al.*

CONTINUANCE—ABUSE OF JUDICIAL DISCRETION.—Applications for continuances are addressed to the sound discretion of the court, and, when made on account of the absence of a witness merely, certain formal and necessary facts must be shown by affidavit; but in other cases good cause only need be shown. Where an affidavit for continuance of a cause, before trial, averred that the defendant was detained at his home in Michigan by the dangerous illness of his wife; that he had a meritorious defense, setting out the substance thereof; that the defendant would testify to the facts set out, and that there was no other witness by whom said facts could be proved; *held*, that in the exercise of a proper judicial discretion the cause should have been continued. The defendant was more than a mere witness, and his application was not within any strict statutory rule. Judgment reversed. Opinion by NIBLACK, J.—*Welcome v. Boswell.*

INCONSISTENCY BETWEEN GENERAL AND SPECIAL VERDICT.—In a suit for damages against a railway company for personal injuries, the jury gave the plaintiff a general verdict for $8,750, and at the same time returned a special verdict by which they found that the plaintiff, on approaching the railroad crossing, saw a freight train standing across the highway, which was parted in the middle, leaving a passage some ten feet wide between the cars, through which the plaintiff attempted to drive; that plaintiff knew it was dangerous to attempt to cross between the cars; and further, that the evidence did not show that the cars, which were inside the boundary lines of the highway, were placed there by defendant. *Held*, that the special findings were inconsistent with the general verdict, and that the law (3 R. S. 1876, 172) is imperative that in such cases the former shall control the latter; that, to justify the jury in their general verdict, it was necessary to find that the plaintiff sustained the injuries complained of without fault on his part (47 Ind. 43; 46 Ind. 25), while the facts found in their special verdict showed contributory negligence on his part. Judgment affirmed. Opinion by HOWK, J.—*Thompson v. The C. L. & C. R. R. Co.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

JUDGMENT OF JUSTICE OF THE PEACE IN CRIMINAL CASE—JURISDICTION OF DISTRICT COURT.—1. The judgment of a justice of the peace in a criminal case can not be reviewed on petition in error in the district court. 2. The district court has no jurisdiction of a criminal case removed on petition in error to it from the judgment of a justice of the peace. Opinion by HORTON, C. J.—*State v. Lofland.*

BLOWING STEAM WHISTLE—WHEN NEGLIGENCE.—1. The blowing of a steam whistle and the letting off of steam are not *per se* acts of negligence or evidence of wrongful conduct on the part of those in charge of a railroad train. But when those acts are done carelessly, heedlessly and without any necessity therefor, they may become acts of negligence, and the railroad company be responsible for injuries caused thereby. Opinion by BREWER, J.—*Culp v. A. & N. R. R. Co.*

EFFECT OF VERDICT OF "NOT GUILTY."—1. In a criminal prosecution where the defendant has pleaded "not guilty" to the charge, and where the case is submitted to a jury and a verdict is rendered, and the court enters judgment that the defendant be discharged and go hence without day; *held*, that such verdict and judgment are conclusive, and that this court can not on an appeal set aside or reverse the verdict or judgment. Opinion by HORTON, C. J.—*State v. Crosby.*

DECREE OF FORECLOSURE—RECEIPT OF SURPLUS—WAIVER.—1. A party holding the fee in mortgaged premises, and against whom a decree of foreclosure is entered, can not, after voluntarily taking the surplus arising from the sale of said premises upon such decree, maintain a proceeding in this court to set aside the decree of sale. The receipt of such surplus is a waiver of any errors, if errors there be, in the proceedings. Babbitt v. Corby, 13 Kan. 612. Opinion by BREWER, J.—*Hoffmire v. Holcomb.*

LIMITED PARTNERSHIP—LIABILITY OF PARTNER—ACCEPTANCE OF NOTE OF ONE OF SEVERAL JOINT-DEBTORS.—1. Where a partner claims that his liability to creditors of the firm is restricted by a special contract between the partners, and no proceedings have been had under the limited partnership act, it is incumbent on him to prove notice to or knowledge by the creditors of such contract limitation, or he will be liable equally with the other partners for the entire debts of the firm. 2. The acceptance of a note by the creditor, of one of several joint-debtors, does not have the effect to discharge the other debtors without agreement to receive it in payment or satisfaction. Opinion by BREWER, J.—*Yetter v. Soper.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF NEBRASKA.

January Term, 1877.

HON. GEORGE B. LAKE, Chief Justice.
" DANIEL GANTT, } Associate Justices.
" SAMUEL MAXWELL, }

CORPORATE FRANCHISE—TAX-PAYERS AS JURORS.—1. An act providing for the incorporation of a city must be accepted as a whole; and the city in accepting the benefits derived therefrom must perform the duties required by law. The corporate franchise is a valuable privilege, and is a sufficient consideration for the duties which the law imposes. 2. The mere interest of a taxpayer and resident of a city is not of itself, under ordinary circumstances, sufficient to disqualify him from acting as a juror in a case in which the city is interested. Judgment affirmed. Opinion by MAXWELL, J.—*City of Omaha v. Olmstead.*

ATTACHMENT—AMENDMENT.—1. An affidavit for the issuance of an attachment may be amended, by leave of the court, even after a motion to quash the proceedings is filed, because of that particular defect. 2. It is not error for the court to permit the officer, before whom the affidavit was made, to attach a venue, according to the fact, even after a motion has been filed to dismiss the attachment on the ground of its omission. Judgment affirmed. Opinion by LAKE, C. J.—*Struthers v. McDowell.*

STATUTE OF LIMITATIONS—MORTGAGE.—1. When it appears on the face of the petition that the cause of action arose at such a period, that under the statute of limitations no action can be maintained thereon, the defendant may demur to the petition, on the ground that the facts stated therein are not sufficient to constitute a cause of action. 2. The proviso to section seventeen of the code of civil procedure, that the absence from the state, death, or the disability of a non-resident, shall not operate to extend the time within which actions *in rem* shall be commenced by and against such non-resident, applies to actions to subject mortgaged property to the payment of the mortgage debt. If action upon a note secured by mortgage is barred by the statute of limitations, an action for foreclosure of the mortgage is also barred. Judgment reversed. Opinion by MAXWELL, J.—*Peters v. Dunnell.*

PLEADING—RELEASE OF SURETY—EXTENSION OF TIME TO PRINCIPAL.—1. When an answer contains an allegation, that one of several defendants, joint makers of a promissory note, was in reality only a surety thereon, to which allegation there is no reply, it will be taken as true; and if the court, on request, refuse to instruct the jury to this effect, it is error. Yet the judgment will not be reversed, unless the error appear to have been prejudicial to the party seeking to take advantage of it. 2. When the defense depended upon showing, in addition to the fact of suretyship, the fact of an extension of the time of payment to the principal, which was alleged but not proved; the refusal of the court to instruct as above stated is no ground for reversal of the judgment. 3. An extension of time to the principal for payment will not have the effect to release the surety, unless the agreement to extend the time be such as will bind the holder of the note, and bar his action against the principal for some definite time. A mere voluntary forbearance on the part of the creditor, enlarging the time of payment without consideration, will not work a discharge of the surety. Judgment affirmed. Opinion by LAKE, C. J.—*Dillon v. Russell.*

NOTES.

THE San Francisco Common Council has passed a special bill permitting a certain Chinaman to carry a pistol three months, because his life is threatened by persons against whom he has testified.

IN the marginal notes to Mr. Jacob Bright's Woman's Disabilities Bill, there is one to the effect that the masculine gender should include females. Is not "include" here a misprint for "embrace?"—*Yorick.*

CHIEF JUSTICE MOSES of the Supreme Court of South Carolina, died at Columbia last week. He was seventy-two years of age.——Ex-Governor Washburn, of Massachusetts, well known as the author of several legal treatises of great merit, died on Monday last.

THE North Carolina Legislature has passed an act placing the price of the reports of the State at $3 per volume, and paying the official reporter a salary. Heretofore, the reporter has had the profits on their sale at the rate of $8 per volume. Hon. W. T. Faircloth is the junior justice of the supreme court of this state. His predecessor, Judge Settle, has been appointed United States District Judge of Florida.

THE VALUE OF A DEFINITION—The Lord Chief Justice of the English Common Pleas, (in Twycross v. Grant, January 24, 1877): All arguments, at least when conducted in the English language, have to commence with a definition. It depends on what is your definition of "consequence." In one sense I quite agree with you; but in another sense it was a consequence of the fraud that the purchaser obtained a worthless thing.—Baron Cleasby in the Exchequer Division (in Attorney General v. Gasquet, January 23, 1877): I do not pretend to give any definition of "domicile" myself, because it has been said that, though so many great minds had applied themselves to it, there is no universally-accepted definition, no agreed on enumeration of its ingredients. I rather agree with the *dictum*: "*In jure civili omnis definitio periculosa.*"—[*Daily Register (N. Y.)*